SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1033 95

HUMBLE OIL & REFINING COMPANY ET AL.,
Petitioners,

vs.

W. C. TURNBOW ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS IN AND FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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MAY IT PLEASE THE COURT:

Petitioners, Humble Oil & Refining Company and Gulf Oil Corporation, respectfully show to the Court:

A.

Opinion Below.

The opinion of the Court of Civil Appeals (R. 353) is reported in 133 S. W. (2d) 191. Opinions deciding prior suits involving the safe land and wells are reported in 90 S. W. (2d) 663 and 99 S. W. (2d) 1096 (Writ refused by Supreme Court of Texas).

B.

Summary Statement of the Matter Involved.

Humble Oil & Refining Company, as plaintiff below, brought this suit to cancel an order of the Railroad Commission of Texas (R. 25) granting W. C. Turnbow and W. C. Turnbow Petroleum Corporation permit to drill and operate two wells for oil and gas on 2½ acres of land, in exception to the said Commission's well spacing rule applicable to the East Texas Field. Defendants below, respondents here, are the permittees, the Railroad Commission of Texas and the members thereof. Gulf Oil Corporation intervened, seeking the same relief as the plaintiff.

Said rule, adopted under the oil and gas conservation statutes (*Ver. Tex. Stats., 1936, Arts. 6014, 6029*), on findings that such general rule is necessary to prevent waste of oil and gas (R. 46-47, 220, 222), provide in substance that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i. e., ten acre spacing), "provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances * * * whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent confiscation of property" (R. 47, 193). The locations involved are 48 feet and 100 feet, respectively, from boundaries, and 100 feet and 200 feet, respectively, from other wells on the 41 acre tract presently mentioned (R. 350A).

Suit to cancel such order is expressly authorized by State law (*Ver. Tex. Stats, 1936, Art. 6049c, Sec. 8*), providing that any interested person affected by any order made by the Commission and who may be dissatisfied therewith, shall have the right to file a suit against the Commis-

sion or the members thereof, to test the validity of such order; and that in such trials, the burden of proof shall be upon the party complaining, and the order complained of shall be deemed *prima facie* valid.

Plaintiff's petition in the District Court attacked the order on the grounds, among others, that (1) the permit order was arbitrary because unsupported by any substantial evidence at the hearing before the Commission (R. 17-18), and (2) was unjust, unreasonable, illegal, and discriminatory in fact as to petitioners, for the reason that it gave the permittees, the 2½ acres, and the 41 acre tract from which it was subdivided after the effective date of the rule (of which it must be considered a part in the administration of the rule, under the express provisions thereof, as recognized in the opinion of the Court of Civil Appeals (R. 356), an undue number of wells, an undue spacing advantage, and an undue advantage in allowable production per acre per day under the Commission's proration order, which was on a per well basis, allowing each tract to produce in proportion to its number of wells rather than in proportion to its underlying oil reserves, discriminated in favor of the permittees against petitioners, by giving the permittees a great advantage in drainage opportunity over petitioners, which the Commission could and should have prevented or lessened, enabling them to drain petitioners' oil, thereby taking petitioners' property without due process of law, and denying them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 17, 21-22). Gulf Oil Corporation, in its intervention, adopted these allegations (R. 30).

On the trial, petitioners introduced the record of testimony and exhibits at the hearing before the Commission, to establish petitioners' first ground of attack, for the limited purpose of showing what the Commission had before

it; and also introduced, on its second ground of attack, testimony *which was not disputed by any other witness at the trial,* showing the involved locations are not in fact necessary under either ground of exception to the rule, but will cause waste of oil and gas, drain large and inestimable quantities of oil from petitioners' leases, in that it gave the permittees, the 2½ acres, and the 41 acres an advantage in well spacing and density of drilling over the neighboring leases, including petitioners', resulting under the proration order in enabling them to drain large amounts of petitioners' oil during the life of the field, which petitioners could not entirely prevent, even by drilling offset wells; that petitioners have reasonably developed their property by the existing wells. This testimony is detailed hereinafter. Defendants offered no evidence on the trial. At the close of petitioners' evidence, the trial court, on defendants' motion (R. 41), entered judgment against petitioners, reciting that there was substantial evidence before the Commission to support the permit order, and that petitioners had failed to sustain the burden of proof (R. 41).

By assignments of error, petitioners presented to the Court of Civil Appeals the Federal questions here presented: (1) under the undisputed testimony adduced on the trial, the permit order is in fact unreasonable and illegal and enables the permittees to drain, take, and confiscate to their own use and benefit property of petitioners, without due process of law, and denies petitioners the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; and (2) the failure of the court to consider the evidence independently adduced on the trial and to make an independent judicial determination of the facts as a basis for ruling on such constitutional question of itself denies petitioners due process of law, in violation of said constitutional provision (R. 351-353). On appeal, the Court of Civil Appeals affirmed judgment of the

trial court on the sole ground that there was substantial evidence before the Commission supporting the permit, mentioning but disregarding the contrary testimony on the trial (R. 356-457). It held that the mere fact that evidence was offered before the Commission tending to support the order ended the inquiry, and the court failed and refused to weigh, consider, or give effect to the undisputed testimony independently adduced on the trial; and failed and refused to make or require to be made an independent judicial determination of the facts.

C.

Statement of the Basis Upon Which it is Contended that this Court has Jurisdiction to Review the Judgment in Question.

(a) *U. S. C. A., Title 28, Sec. 344 (Judicial Code, Sec. 237, amended), subparagraph (b).*

(b) The judgment of the Court of Civil Appeals sought to be reviewed is dated October 18, 1939 (R. 358). Petitioners on November 2, 1939 (being timely under the State Law, *Ver. Tex. Stats., 1936, Art. 1877*), filed their motion for rehearing and request for findings of fact and conclusions of law in the Court of Civil Appeals (R. 358-364), and said court entertained and overruled said motion on November 15, 1939 (R. 365).

The judgment of the Court of Civil Appeals is a final judgment. While the case is not one in which, under Texas statutes, the judgment of the Court of Civil Appeals is conclusive on both law and facts and one in which writ of error from the Supreme Court of Texas is not allowed (*Ver. Tex. Stats. 1936, Art. 1821)*, but is a case within the appellate jurisdiction of the Texas Supreme Court *(Ver. Tex. Stats., 1936, Art. 1728)*, the final judgment of the Court of Civil

Appeals is, nevertheless, that of the highest State court in which a decision could be had, in view of the refusal by the Texas Supreme Court to exercise its discretionary power to review the decision. Petitioners in due time *(Ver. Tex. Stats., 1936, Art. 1742)* filed their petition to the Texas Supreme Court for a writ of error on December 15, 1939 (R. 365), and same was entertained and refused on January 3, 1940 (R. 368). Petitioners then filed, on January 18, 1940 (R. 370), their motion for rehearing in the Supreme Court, same being timely and authorized by State law *(Ver. Tex. Stats., 1936, Arts. 1750, 1762)*, and the Supreme Court entertained said motion and overruled it on January 24, 1940 (R. 370), from which latter date the time for applying to this Court for further review begins to run. *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20, 21, 44 S. Ct. 11, 12; *Citizens Bank of Michigan City, Ind.*, v. *Opperman*, 249 U. S. 448, 450, 39 S. Ct. 330, 331; *Texas Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 4 S. Ct. 497, 498.

(c) The nature of this case and the rulings of the court below are such as to bring this case within the jurisdictional provisions relied upon. The Railroad Commission of Texas controls both the number of wells which may be drilled and the amount of oil that may be produced, so that operators are no longer able to fend for themselves in the protection of their property from drainage of the underlying oil resources, and under the proration order, an operator who is granted by the Commission more wells than his neighbors in proportion to the acreage of each, or more wells than are necessary to protect his own property from drainage, receives a greater allowable per acre and, due to the uniformity of sand conditions and oil content in localized areas, obtains a drainage advantage over his neighbors under the proration order, enabling him to drain and produce indefinitely in the future oil from his neighbors as certainly

as if he were permitted to drill a well on his neighbors' land. This is the nature of the confiscation and discrimination brought about by the Commission's order here attacked as violative of petitioners' constitutional rights, which point they expressly pleaded as a Federal question in the trial court, and have preserved at each successive step since. That such point presents a Federal question is supported by this Court's decision in *Thompson* v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55, 57 S. Ct. 364, wherein it was held that a Commission order which would result in drainage of large quantities of gas from complainant's property to the property of others, takes property from one and gives to another, and would violate the Federal Constitution. The same holding has been applied to taking oil by drainage in *Railroad Commission* v. *Rowan & Nichols Oil Company*, 107 F. (2d) 70, wherein the Circuit Court of Appeals, 5th Circuit, held that a proration order confiscated the property of complainant in violation of the Fourteenth Amendment to the Constitution of the United States in that it was proved that the result of the order would be to cause complainant to lose approximately one-half of its oil by drainage to wells of others. The same question is here presented, in that the same resulting drainage will be accomplished from petitioners' leases through giving permittees and the 41 acre tract of which permittees' tract is a part for administrative purposes an undue number of wells, enabling them to drain large quantities of oil from petitioners' leases. (See also opinion of United States District Court in *Rowan & Nichols Oil Company* case, 28 Fed. Supp. 131.) With this Federal question presented for judicial determination, it was the duty of the Texas courts to make an independent judicial determination of the facts in so far as is necessary to determine the constitutional question, and their failure to make such independent judicial determination is itself a denial of due process of law in

violation of the Fourteenth Amendment to the Constitution of the United States. *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 528; *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285, 296; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 56 S. Ct. 720; *United Gas Public Service Co.* v. *State of Texas et al.*, 303 U. S. 123, 139, 58 S. Ct. 483, 491. The trial court and Court of Civil Appeals denied this right by holding that the mere existence of evidence tending to support the permit at the hearing before the Commission (regardless of its truth or falsity, which was not judicially determined) ends the judicial inquiry, and in sustaining the permit on that basis without considering the undisputed testimony independently adduced on the trial and without making an independent judicial determination of the facts.

While the opinion of the Court of Civil Appeals did not expressly state that the Federal questions here presented were considered and overruled, nevertheless such questions were so involved that their determination was necessary to the disposition of the issues, especially in view of the fact that the Federal question asserted, if correct and enforced, requires a judgment different from that rendered; hence, the failure of the Court of Civil Appeals to overrule expressly the Federal questions does not affect jurisdiction of this Court. *West Chicago Street Railway Co.* v. *Illinois*, 201 U. S. 506, 26 S. Ct. 518, 521; *Chicago B. & Q. Railway Co.* v. *Illinois*, 200 U. S. 561, 26 S. Ct. 341, 345; *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania*, 296 U. S. 113, 122, 56 S. Ct. 31, 36.

(d) The questions involved are substantial in that petitioners are and will be deprived of large quantities of their property without being accorded a judicial trial and determination of the facts, and the making of such judicial determination is material in that it would necessarily require reversal of the judgment, because the undisputed

evidence on the trial showed that the permit is not in fact supportable under either ground of exception to the rule, but will cause waste, and is illegal, unjust, unreasonable and discriminatory as to petitioners in that it gives permittees great and unnecessary advantage in drainage, enabling them to appropriate to their own use and benefit large quantities of petitioners' oil and will otherwise injure petitioners' leases and wells.

The question of confiscation and discrimination arising through granting a neighboring operator permit to drill an undue number of wells on his tract, in exception to a conservation rule issued under the State's police power, presents a Federal question of substance, which has not heretofore been presented to and determined by this Court, and petitioners believe and represent that the lower courts have not decided such question in accordance with principles of law laid down by decisions of this Court. A direct decision of such question by this Court is of special and peculiar importance in that much litigation has arisen and will arise under the conservation rules, questioning the validity of special orders of the administrative board granting exceptions to the general well spacing rule.

The disposition of the Texas courts to test the validity of such orders on the basis of whether there was substantial evidence before the Commission tending to support its order, refusing to determine the facts judicially where violation of rights under the Federal Constitution are expressly alleged, presents a question of far-reaching importance to the jurisprudence, in that by such holding the court in effect surrenders its constitutional function to exercise independent judicial power, and leaves the final determination of property rights to a mere administrative agency. Such holding leaves a citizen's constitutional rights to the final determination of the Executive Department.

(e) The Federal questions sought to be reviewed were raised in the court of first instance and in the appellate court, and were passed upon by those courts, as follows:

Plaintiff's Original Petition in the District Court contained the following allegations attacking the validity of the permit order:

"10."

"Plaintiff further shows that said order granting the permit to drill the wells in controversy is unreasonable, discriminatory and unjust in fact in its operation against plaintiff, and is in violation of the conservation laws and the well spacing rule of the Railroad Commission applicable to said land and field, and should be annulled by judgment of this Court for the reasons set out hereinabove and because:

* * * * * * *

"(j) Because, even if the Commission was entitled to consider as evidence the private opinion of applicants' witnesses in reference to increased recovery through operation of wells spaced in violation of Rule 37 as a basis for granting permit for well locations complained of, nevertheless the Railroad Commission has no right or authority to place Defendants Turnbow and W. C. Turnbow Petroleum Corporation in a position of advantage with respect to plaintiff as will enable said defendants to drain large quantities of plaintiff's oil, under the guise of conserving oil and gas; and it being the duty of the Railroad Commission, in the exercise of its power in regulating both the number of wells to be drilled and the amount of oil which may be produced therefrom, to equitably distribute the drilling of wells and the allowable production therefrom in such manner as will not enable defendants and other persons owning interests in the minerals in and under said 2.5 acres to have an advantage in drainage opportunity over adjoining leaseholders, said Railroad Commission if authorized to

grant the permit complained of, at the same time and in the same order should have adjusted the allowable production of the two well locations thus granted defendants, and the allowable of other wells on the original 41 acre portion of the McGrede tract, so that the combined allowable of all wells on said original 41 acre portion of the McGrede tract would not exceed the present allowable of the wells on said 41 acres, exclusive of the two additional well locations granted dofendants herein; and by reason of its failure to so adjust the allowable, its order granting said permits on the ground of preventing waste is arbitrary, unreasonable, unjust and discriminatory against plaintiff. In this connection plaintiff shows that at the time of filing of this suit, said original 41 acres had an equality in drainage opportunity with adjoining leases, including plaintiff's lease, without the two wells in suit; that in the absence of such adjustment of allowable the two wells in suit operating in connection with other wells on the original 41 acres will drain large and inestimable quantities of oil and gas from plaintiff's lease and said original 41 acre tract will have a great advantage in drainage opportunity over plaintiff's lease, and the owners of the present component parts of said 41 acres, particularly Defendants Turnbow and W. C. Turnbow Petroleum Corporation, will drain and appropriate to their own use and benefit, without compensation to plaintiff, large quantities of oil and gas underlying plaintiff's lease, which plaintiff's wells would otherwise produce; that if said allowable were so adjusted, such drainage of oil and gas from plaintiff's lease to wells on said original 41 acres would be materially less, and plaintiff would suffer less injury by reason thereof; that in this regard the action of the Railroad Commission in granting such permit without adjusting the allowable denies plaintiff the equal protection of the law and due process of law and discriminates against plaintiff in favor of said defendants, and if it be held and determined that the drilling of two additional wells in this area will prevent waste,

nevertheless the failure of the Railroad Commission to adjust the allowable in connection therewith so as to prevent the above mentioned increase in drainage advantage in favor of the original 41 acres over plaintiff's lease does and will cause an unlawful taking of plaintiff's property for private and public benefit, without compensation to plaintiff; all in violation of the Constitutions of the United States and the State of Texas" (R. 17, 20-22).

Gulf Oil Corporation adopted the foregoing allegation in its Petition in Intervention (R. 30).

The trial court's ruling has been stated. The trial court had before it evidence, hereinafter related, independently adduced on the trial and undisputed (defendants having offered no evidence thereon), establishing that the involved locations are not in fact necessary under either ground of exception to the rule but will cause waste and drain large and inestimable quantities of oil from petitioners' leases and otherwise lessen the value thereof.

In the Court of Civil Appeals petitioners presented their fourth Assignment of Error, asserting that the judgment was erroneous because petitioners proved by unrebutted evidence independently adduced on the trial that the 41 acres was fully protected from drainage, possessed a reasonable opportunity to get its fair share of the oil, did not need these two additional wells for such purposes, and that such two wells will force seven closely spaced offsets, create uneven spacing and withdrawals, and cause waste of oil and gas and injury to petitioners (R. 351-352); their fifth Assignment of Error, asserting that the trial court denied petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by failing to consider the testimony independently adduced on the trial and to determine judicially the facts (R. 352); and their sixth Assignment of Error, asserting in substance,

that if a conservation basis existed for two additional wells, nevertheless the permit order was unreasonable, unjust and discriminatory in fact, because under the undisputed evidence on the trial, one well on the 2½ acres will produce more than the recoverable oil underlying it, and the other wells on the original 41 acres reasonably protect the whole of same from drainage, and the two additional wells will drain large quantities of petitioners' oil, which petitioners could not entirely prevent even by drilling offset wells, and the Commission's action in granting the two additional wells in the light of the proration order without making the permit conditional that the combined allowable of wells on the 41 acres would not be increased by operation of these two additional wells, which would have materially lessened the resulting injury to petitioners, renders the order discriminatory and confiscatory as to petitioners, in violation of the Fourteenth Amendment (R. 352). The ruling of the Court of Civil Appeals has already been stated.

Petitioners' Motion for Rehearing in the Court of Civil Appeals reasserted the above questions in Grounds Nos. 4, 5 and 6 (R. 360-362), in connection with which they requested said court to file its Findings of Fact and Conclusions of Law on the evidence independently adduced on the trial (R. 361, 362). This motion was overruled as above stated.

The Petition to the Texas Supreme Court for Writ of Error again presented these questions in Assignments of Error Nos. 5 to 10, both inclusive (R. 365-368), and were again presented in their Motion for Rehearing in that court in Grounds Nos. 2 and 3 (R. 369-370). In that the substance of the questions covered by these assignments and grounds has been stated above, we omit restating them here for brevity. The Supreme Court refused Writ of Error and overruled Motion for Rehearing as above stated.

D.

Questions Presented.

1. Whether the administrative order granting Turnbow's permit for two wells as exceptions to the spacing rule to prevent waste and confiscation of property is invalid, in view of the undisputed evidence independently adduced on the trial *de novo* showing that the drilling and operation of the Turnbow wells is not necessary to prevent waste or confiscation of property within the meaning of the field spacing rule, and will cause waste of oil and gas under petitioners' property, and drain large and inestimable quantities of oil from their respective leases and force petitioners to drill and equip at great expense additional wells as offsets which are otherwise unnecessary to the development of their property, and which will not even if they be drilled entirely prevent the drainage from petitioners' leases.

2. Whether, even assuming there was proper evidence before the Commission that the Turnbow wells were necessary from the standpoint of conserving oil, the granting of the permit in the light of the existing proration order allocating production in this area on a per well basis, without at the same time making some provision in the permit fairly protecting petitioners as far as possible from the additional drainage of their leases, which will undisputably result from such wells (such as by providing that operation of the Turnbow wells should not increase the total allowable for the 41 acre tract), renders the permit order illegal, unreasonable, unjust, discriminatory and confiscatory in fact as to petitioners, contrary to their rights under the Fourteenth Amendment to the Constitution of the United States, when the undisputed evidence establishes that one well on the 2½ acres will produce more than the recoverable oil under it, that existing wells on the 41 acres reasonably

protect the whole tract (including the 2½ acres) from drainage, that the two additional wells will drain large quantities of oil from petitioners' leases and force petitioners to drill offset wells, otherwise unnecessary for the development of their property, and even with the drilling of which such drainage will not be entirely prevented.

3. Whether the State courts denied petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by failing to give effect to the undisputed testimony independently adduced on the trial, and by failing to make an independent judicial determination of the facts on which the above pleaded constitutional questions are based.

E.

The Facts.

The 2½ acres was voluntarily subdivided from a 41 acre lease in 1934 (R. 45, 214A), while the Railroad Commission's spacing rule was in effect; and the Commission's rule provides (R. 47, 231) and the opinion of the Court of Civil Appeals recognizes (R. 356-357) that this subdivision must be disregarded in administering the spacing rule.

Exhibit 81 (R. 70, 350) is an accurate survey map of the 41 acre tract (41.26 acres), including the 2½ acres, and of the surrounding area (R. 56-59). On the date of the permit (as of which time the validity thereof must be tested under the Texas decisions: *Magnolia Petroleum Co. et al.* v. *New Process Production Co. et al.*, 129 Tex. 617, 104 S. W. (2d) 1106, 1111; *Railroad Commission* v. *Magnolia Petroleum Company*, 130 Tex. 484, 109 S. W. (2d) 967, 970; *Humble Oil & Refining Company* v. *Railroad Commission et al.*, 99 S. W. (2d) 401, 402), the 41 acres had an average density of 5.16 acres per well, exclusive of those in controversy, which was equal to or greater than the

density of various sized surrounding areas compared on the trial and outlined on Exhibit 81 (R. 58-60, 60-66). A geologist and petroleum engineer, witnesses for petitioners, testified on the trial in regard to the reservoir conditions in this area, drainage opportunity, sufficiency of the development and injuries which petitioners will suffer by reason of the two wells in controversy, and we will summarize the facts established by their testimony, which was undisputed on the trial. The sand is continuous in the area, the porosity and permeability being very good and average for the field, or better (R. 86-88). The sand becomes gradually thinner to the east and thicker to the west of the 2½ acres, but each adjacent acre has relatively the same oil content (R. 88-89). All the wells in the area are allowed to produce 20 barrels daily under the Commission's proration order, and are good flowing wells (R. 89, 90). Gas is in solution with the oil in the reservoir, and this makes the oil less viscous (R. 90). The fluid in the reservoir moves from points of higher pressure to points of lower pressure existing at and near the bottom of wells, created by removal of oil (R. 166-167). Tests indicate, where average sand conditions prevail, production of a well will cause a pressure drop and movement of fluid for a distance of 1200 feet around it (R. 166-167). The pressure in this area is normal (R. 167). The 41 acres, exclusive of the Turnbow wells, had an average density of 5.15 acres per well and a daily allowable per acre of 3.87 barrels, and with Turnbow No. 1 would have an average density of 4.58, and with Turnbow's Nos. 1 and 2 would have an average density of 4.12; the adjoining leases were drilled to an average density of 5.35 (R. 91-93, 350A). The Turnbow wells are offsets only to wells on other portions of the 41 acres, and the 41 acres already possessed an offset advantage over the adjacent leases, considering the spacing all the way around the track (R. 93-97); and if the Turnbow wells are

not operated, the existing wells on the 41 acres will drain and produce the oil underlying the 2½ acres (R. 104-105). The 41 acres had sufficient wells, exclusive of those in controversy, to produce the equivalent of the recoverable oil in place under the tract (R. 98). Under the per well allowable as fixed by the Commission for this area, the more densely drilled tracts are allowed to produce oil at a more rapid rate from the standpoint of acreage and reserves than surrounding areas which are less densely drilled, which causes drainage of oil from the less densely drilled tracts to the more densely drilled tracts where the withdrawal of oil is greater (R. 99). The Turnbow wells will drain oil from petitioners' leases (R. 98, 167-168).

The 2½ acres with one well would have a daily allowable of 8 barrels per acre, and with two wells would have a daily allowable per acre of 16 barrels (R. 105-106). Humble's adjoining lease had a density of 5.4 acres per well and a daily allowable per acre of 3.66 barrels, and Gulf's adjoining lease had a density of 4.6 acres per well and an allowable of 4.3 barrels per acre per day (R. 91-92). In the surrounding area eight times the size of the 2½ acres (three times its length and three times its width), there are only four wells, two of which are on the 41 acres, the average density of such surrounding area being one well to 5 acres (R. 105-106). By reason of its density and allowable per acre advantage, the two Turnbow wells will cause drainage of oil from the adjacent tracts to the 2½ acres and the 41 acres (R. 99). Considering both comparative density and well spacing, the 41 acres was adequately protected from drainage by existing wells when the Turnbow permit was granted, and the operation of the Turnbow wells will increase the drainage opportunity of the 41 acres against the surrounding areas, causing drainage of oil from petitioners' leases to Turnbow's wells (R. 167-168). If the Turnbow wells are not operated, petitioners' leases are pro-

tected from the offset well standpoint as against the 41 acres, but if the Turnbow wells are to be operated, two offsets will be necessary on each petitioner's lease to lessen the drainage therefrom, but the drilling of such offsets would not entirely prevent the drainage (R. 99-102, 168-169). For the same reason the Turnbow wells would require the drilling of five offset wells on a lease of General American Oil Company, making a total of nine offsets (R. 101-103, 350). None of the offsets would comply with the 660-330 foot provisions of the Commission's spacing rule, and would bring about a concentration of drilling (R. 169) in that there would be a total of 18 wells in an area 750 feet wide east and west, and extending 500 feet north of the 2½ acres and 300 feet south thereof (R. 103-104). There is no comparable concentration of wells in the area, and such wells, therefore, will cause uneven spacing of wells (R. 104), uneven withdrawal of oil and a greater pressure drop in this vicinity, which will cause earlier and uneven encroachment of salt water underlying the oil into the oil saturated portion of the sand (R. 90, 169), which will tend to lessen recovery through trapping of oil in the reservoir (R. 107-109, 169-170, 171-172).

The wells in this area normally produce their 20 barrels daily allowable in about 20 minutes, and the reservoir pressure then equalizes at the bottom of the wells in a short time (R. 170). Gas will begin to come out of solution with the oil whenever the reservoir pressure declines to about 750 pounds (R. 161), and a densely drilled area, such as will result from the Turnbow wells, will develop that condition earlier than less densely drilled areas, and free gas will then by-pass the oil, which will become more viscous. The Turnbow wells will advance the time when the the pressure will cease to equalize, thus decreasing the flowing life and producing life of the wells in this area (R. 171). The

situation which will be created by the Turnbow wells will lessen recovery of oil from the field (R. 145-146), and will increase the fire hazard (R. 173). Earlier pumping will increase the operating cost (R. 173). Each of the offset wells will cost $10,000 to $12,000 (R. 173).

One well on the 2½ acres will produce during its life in excess of the amount of recoverable oil under said tract (R. 108-109); and two wells thereon will enable it to recover still more oil by drainage from adjacent tracts, which will decrease the recovery from the adjacent tracts in proportion to the increased recovery from the 2½ acres (R. 171).

There is no place in this area where there are an insufficient number of wells to recover the underlying recoverable oil, and the area is completely developed (R. 109).

The Railroad Commission held four hearings on Turnbow's applications to drill on the 2½ acres, July 2, 1934, November 1, 1934, June 24, 1937, and September 23, 1937. At the trial, petitioners offered a transcript of each of said hearings, *for the limited purpose of showing what testimony and proceedings were had before the Commission*, on their allegation that the permit order was not supported by proper evidence and was arbitrary (R. 48, 49, 52, 53-54). Only questions of the title were discussed at the first hearing, and not being relevant to the questions here presented, we omit discussion of it.

At the hearing on November 1, 1934, witness Murchison, a geologist, the sole witness on matters of drainage and development, testified the sand conditions in this area are substantially uniform as to saturation, porosity, and permeability (R. 290), and disregarding the partition of the 2½ acres from the 41 acres, the whole tract is fully developed (R. 291); that the two Turnbow locations would require nine offset wells, all of which would be less than the distances provided in the spacing rule (R. 294-297), will create

an area of congested drilling, cause uneven spacing and uneven withdrawals, and waste of oil and gas (R. 297), dissipate reservoir energy, cause earlier and uneven encroachment of water, and increase the fire hazard (R. 297-298).

At the June 24, 1937 hearing before the Commission, Turnbow's sole witness, Hudnall, testified the 41 acres is reasonably protected from drainage and has a slight advantage over adjacent leases, disregarding the subdivision and the Turnbow wells (R. 259, 261, 263); that in his opinion the Turnbow wells increase recovery of oil and thereby prevent waste (R. 251-252); that this tract is in the fairway (R. 250); that his opinion regarding increased recovery is based on the view that closer spacing of wells generally than the Commission's rule provides will yield greater recovery of oil than spacing in accordance with the distances provided in said rule (R. 255-256); that this area has very good pressure which equalizes rapidly, enabling free migration of oil through the sand, porosity and permeability thereof being average for the field, and there are no peculiar conditions in the reservoir at this point which would reduce the migratory ability of the oil below its usual ability to migrate (R. 255-256); that in his opinion greater recovery would be obtained from the field if the entire field were drilled to the same density as the Turnbow 2½ acres (R. 265); that the two Turnbow wells will require nine offsets, of which Humble and Gulf would need two each (R. 261); that the two Turnbow wells during their life will produce about 149,000 barrels of oil by drainage from tracts adjoining the 2½ acres (R. 263).

At the September 23, 1937 hearing, Turnbow's sole witness, Griffin, testified that if you disregard the subdivision and consider the 2½ acres as a part of the entire 41 acre tract for development purposes, the two Turnbow wells are not needed, the 41 acres being reasonably protected

from drainage, reasonably developed, and has an opportunity to receive its fair share of the oil (R. 315-316); that in his opinion the Turnbow wells will increase the ultimate recovery of oil by lessening the drainage area for individual wells (R. 312), explaining that he had not studied the sand conditions in this area (R. 316-317), but he believed them to be better than average for the field (R. 318) in that the wells have good potential and are capable of flowing large quantities of oil (R. 320); that his opinion regarding increased recovery is based on the proposition that the closer together the wells are, the less waste there will be, that he sees no reason for having wells widely spaced, that he applies such opinion to the entire field—the more wells you drill anywhere in the field, the more oil you will recover, and his opinion regarding increased recovery by these two wells was not based on any peculiar conditions in the reservoir in this area, because he knows of no such peculiar conditions (R. 321-323); that the Turnbow locations will force seven offsets (R. 326) and bring about a concentration of drilling on and around the 2½ acres (R. 327-328); that even spacing of wells will prevent waste (R. 333).

F.

Specification of Errors.

The Court of Civil Appeals erred:

(1) In upholding the permit order and in affirming judgment of the trial court denying petitioners' prayer for relief, there being undisputed evidence independently adduced on the trial showing the Turnbow wells are not necessary under either ground of exception to the field spacing rule and will cause waste of oil and gas, that there were already sufficient wells on the 41 acre tract (which includes the Turnbow 2½ acres for administrative purposes) to rea-

sonably develop and protect the whole tract from draininge and to drain the oil underlying the 2½ acres, that one well on the 2½ acres will produce more than the recoverable oil underlying the 2½ acres, and each of the two wells permitted thereon will drain large quantities of oil from petitioners' leases and force petitioners to drill and equip at great expense offset wells which are otherwise unnecessary for developing their property and which will not entirely prevent such drainage even if drilled, and showing that the two Turnbow wells will decrease the flowing life and producing life of wells in this area and cause other injuries to petitioners; said orders being as a matter of law illegal, unjust, unreasonable, discriminatory, and confiscatory as to petitioners, denying them equal protection of the law and taking their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(2) In failing and refusing to make or cause to be made an independent judicial determination of the facts from the evidence adduced on the trial, to determine whether the order permitting the Turnbow wells, in its operation and effect, denies petitioners the equal protection of the law and deprives them of their property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(3) In holding the permit valid and in affirming the judgment of the trial Court against petitioners on the sole ground that testimony was offered at the hearing before the Railroad Commission to the effect that the locations in controversy will prevent waste on the theory that the general provisions of the field spacing rule cause rather than prevent waste, and that the more wells drilled and the closer they are spaced anywhere in the field, regardless of whether

they comply with the minimum distances provided in the spacing rule, will increase recovery of oil; the Court having failed to consider and give effect to the undisputed evidence adduced on the trial *de novo* showing said wells are not necessary under either ground of exception to the rule, but will cause waste of oil and gas, and will greatly drain oil from and otherwise injure petitioners' leases.

(4) In upholding the permit order and judgment of the trial court, even assuming that there was proper evidence before the Railroad Commission that the Turnbow wells were necessary from the standpoint of conserving oil, because the granting of the permit, in the light of the existing proration order allocating production in this area on a per well basis, without at the same time making some provision in the permit fairly protecting petitioners as far as possible from additional drainage of their leases, which will undisputably result from such wells, (such as by providing that operation of the Turnbow wells should not increase the total allowable for the 41 acre tract) renders the permit illegal, unreasonable, unjust, discriminatory, and confiscatory in fact as to petitioners, contrary to their rights under the Fourteenth Amendment to the Constitution of the United States, there being undisputed evidence that there were already sufficient wells on the 41 acre tract (which includes the Turnbow 2½ acres for administrative purposes) to reasonably develop and protect the whole tract from drainage and to drain the oil underlying the 2½ acres, that each of the two wells on the 2½ acres will produce more than the recoverable oil under such 2½ acres, and each of such two wells will drain large quantities of oil from petitioners' leases, and will otherwise injure them, and will force petitioners to drill and equip at great expense offset wells which are otherwise unnecessary for the

development of their property, and which, even if drilled, will not entirely prevent such drainage.

G.

Reasons for Allowance of the Writ.

1. The Court of Civil Appeals herein held (133 S. W. (2d) 191, 192) that the subdivision of the 2½ acres from the 41 acres in 1934 is required to be disregarded under the Commission's rule (R. 9-10, 195), the spacing provisions of which have been in effect since prior to that time—R. 7-9, 178-195), as established by final judgment in a prior suit between the same parties involving the same wells (99 S. W. (2d) 1096).

The undisputed evidence, both before the Railroad Commission and in the trial court, showed the 41 acres was fully protected from drainage and had an advantage in well spacing, density, allowable and drainage opportunity over the adjoining tracts. Therefore, the Turnbow wells could not be legally granted under the clause in the Commission's rule providing for exceptions when "necessary to prevent confiscation of property", under a well settled line of Texas decisions, and the granting of permit on that ground was illegal and arbitrary: *Gulf Land Co.* v. *Atlantic Refining Co.*, 131 S. W. (2d) 73, headnotes 28 and 29; *Sun Oil Co.* v. *Railroad Commission*, 68 S. W. (2d) 609, affirmed 84 S. W. (2d) 693; *Turnbow* v. *Barnsdall Oil Co.*, 99 S. W. (2d) 1096 (writ refused). Hence, if the permit is sustainable at all, it must be under the exception clause where "necessary to prevent waste." The trial court and Court of Civil Appeals upheld the permit under that ground, holding there was "substantial evidence" before theRailroad Commission of necessity to prevent waste (R. 41, 356-357).

When the Commission adopted the 660-330 foot rule for the East Texas Field, it expressly found such spacing was necessary to prevent waste (R. 46-47, 220, 222). There is no statutory authority for the spacing rule except on that premise. In *Stanolind Oil and Gas Co.* v. *Midas Oil Co.*, 123 S. W. (2d) 911, 915 (writ dismissed), this same Court of Civil Appeals held:

> "*If there be no reasonable relationship, therefore, between the spacing provisions of the rule and the prevention of waste, such spacings become purely arbitrary,* and the Commission has exceeded its authority in prescribing them. The validity of the rule has been repeatedly upheld. The very term 'exception' thereto necessarily implies a deviation or departure from the general rule. *If an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule. That is, that underground conditions, e.g., sand thickness, saturation, porosity, permeability, well potentials bottom hole pressure, and drainage in the area of the particular well, differ from those obtaining generally, and on which the rule itself is predicated.*" (Italics ours.)

The undisputed evidence both before the Commission and the trial court showed there are no exceptional conditions in the reservoir rendering the general spacing rule less applicable here than to the field generally; and it is apparent that opinion testimony based on the theory, as it admittedly was here, that the more wells you drill anywhere in the field and the closer they are spaced, the more oil will be recovered, "resolves itself into an attack upon the validity of Rule 37, although under the guise of an application for a permit as an exception to the rule", as unanimously held by the same Court if Civil Appeals in *Railroad Commission* v. *Marathon Oil Company,* 89 S. W.

(2d) 517, 518 (writ of error refused). The effect of such testimony is that the restrictive provisions of the rule cause waste in every instance, and every conceivable location, regardless of spacing, is necessary under the exception "to prevent waste." In the Marathon case the court further held the Commission has the power to amend or abrogate its rule, "but until such action or until the rule is set aside in a direct proceeding instituted for that purpose, it is the imperative duty of the courts to enforce it." Other Texas cases holding this character of testimony does not justify an exception under the "waste" ground, because it merely attacks the wisdom of the general rule itself, are: *Arkansas Fuel Oil Company* v. *Reprimo Oil Company,* 91 S. W. (2d) 381, 384 (writ dismissed); *Murphy* v. *Turman Oil Company,* 97 S. W. (2d) 485, 487 (writ of error refused); *Magnolia Petroleum Company* v. *Railroad Commission of Texas,* 105 S. W. (2d) 787, 789; *Railroad Commission* v. *Gulf Production Company,* 115 S. W. (2d) 505, 507; *Tide Water Associated Oil Company* v. *Railroad Commission,* 120 S. W. (2d) 544, 546.

In *Sun Oil Company* v. *Railroad Commission,* 68 S. W. (2d), 609, 612, it was held:

> "The Commission is the duly constituted agency of the state to ascertain what constitutes waste of oil and gas. This it must do after hearings and a careful investigation with reference thereto. *And when it has promulgated a general rule, a power expressly delegated to it, after a full and careful consideration of the subject to which such rule related, as amended rule 37 was, it cannot thereafter even itself arbitrarily grant exceptions thereto which would in effect indutiably destroy the efficacy of the rule itself.*" (Italics ours.)

In *Ward* v. *Board of County Commissioners,* 253 U. S. 17, 40 S. Ct. 419, 421, the Supreme Court held it is within its

province to inquire not only whether a Federal right was denied in express terms, but whether it was denied in substance and effect as by putting forward non-Federal grounds of decision that were without any fair or substantial support. We urge that such is the case here, and that petitioners should not be deprived of an adjudication of the Federal questions presented, nor should the courts allow to stand a permit order which is indisputably discriminatory and confiscatory as to petitioners, on the flimsy ground that an exception can be granted to Turnbow on testimony which is in substance and effect that the spacing provisions of the rule are unwise and cause waste in their general application, the Commission at the same time leaving such rule in effect and undertaking to enforce it against petitioners and others in the field. The holding of the Court of Civil Appeals that testimony attacking the wisdom of the rule is substantial evidence of a right to an exception *under* the rule is without fair or substantial support in logic or reason, and is directly contrary to their prior decisions above cited, none of which the court discussed or attempted to distinguish in its opinion.

2. The testimony relied upon by the Court of Civil Appeals to support the permit order was testimony introduced at the hearing before the Commission. It was not introduced for all purposes on the trial, but solely for the limited purpose of showing what testimony and proceedings were had before the Commission, on petitioners' contention that the permit was arbitrarily granted without any legal evidence having been introduced before the Commission to support its order. The Texas Supreme Court held in *Magnolia Petroleum Company* v. *New Process Production Company*, 104 S. W. (2d) 1106, 1111, "when the ruling of the Commission is appealed to the District Court of Travis County, such court is not confined to the evidence heard by

the Commission, but may hear other proper evidence bearing on the issues involved"; and in *Railroad Commission* v. *Magnolia Petroleum Company*, 109 S. W. (2d) 967, 970, said court held: "The conditions as they existed when the Railroad Commission acted is the controlling inquiry before the District Court in cases of this character, not what evidence was heard by the Commission * * *." In *Empire Gas and Fuel Co.* v. *Railroad Commission*, 94 S. W. (2d) 1240, 1244 (writ refused), the Court of Civil Appeals, Third District, held:

> "*While the transcript of the evidence before the commission would not in and of itself be competent as proof on the issues presented to the trial court, the proceeding there being a trial de novo, determinable by competent proof under the rules of evidence,* where, as here, it was alleged that the commission acted without evidence, consideration of the record of the hearing before the commission would, it seems to us, be the most practical way of determining that question." (Italics ours.)

In the instant case, the court below has given *conclusive* effect to the testimony at the hearing before the Commission, disregarding the fact that it was introduced at the trial for a mere limited purpose, and disregarding all testimony independently adduced by petitioners at the trial. The court below has not attempted to weigh the testimony and judicially determine the facts in connection with petitioners' allegation that the order violates their rights under the Federal Constitution. The writ should be granted because such procedure of itself denies petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, as held in the cases cited on page 8, *supra*. The Texas courts have denied a trial in the true sense, and have left the determination of petitioners' constitutional rights solely to a mere adminis-

trative board by refusing to review its action because, they say, there was testimony uttered before the Commission tending to support the permit order, the truth or falsity of which testimony has not yet been decided by any court in this case. Even if the testimony before the Commission had been introduced *for all purposes,* it would nevertheless have been the duty of the courts to weigh the testimony independently adduced on the trial along with such testimony before the Commission to determine whether in fact petitioners are denied the equal protection of law and are deprived of their property without due process of law in violation of the Federal Constitution. This the trial court did not do because its judgment expressly makes the sole finding that there was substantial evidence before the Commission and no attempt is made to weight the evidence independently adduced before the court on the trial (R. 41). The writ should be allowed in order to afford petitioners an independent judicial determination of facts on the Federal questions presented.

3. The undisputed testimony, both before the Commission and on the trial, shows the 41 acre tract, which includes the 2½ acres, was fully protected from drainage, and in fact had an advantage over the adjoining leases, including petitioners'; that the two Turnbow wells will increase such advantage and result in drainage of large quantities of oil from petitioners' property, which drainage petitioners cannot prevent even by drilling offsets at great expense, and which offsets are not otherwise necessary to the development of their leases; will bring about a concentration of drilling and uneven withdrawals which will lessen the flowing and producing life of petitioners' nearby wells, and increase the expense of operating them, resulting in earlier abandonment; that one well on the 2½ acre tract would produce more oil than the recoverable oil under it, whereas two wells thereon will enable the permittees to drain vastly

greater quantities of oil from the neighboring tracts. Petitioners being unable to fend for themselves in view of the fact that the Railroad Commission regulates both the number of wells to be drilled and the allowable production therefrom, the granting of two wells to the permittees under the circumstances denies petitioners the equal protection of the law and causes and will cause a taking of their property without due process of law in violation of the Fourteenth Amendment. Petitioners' hands are tied by the Commission's rules, and they are unable to protect themselves from this invasion of their constitutional rights unless the courts are willing to decide the facts and exercise their time-honored judicial functions instead of leaving them to the final determination of the administrative body. The writ should issue so that this Court may protect petitioners' constitutional rights which are directly involved and which are taken from them by the judgment complained of.

4. Even if there were some basis in the conservation laws for the permit order complained of, which petitioners do not concede, nevertheless the writ should be granted, because the Railroad Commission had before it testimony by Turnbow's own witnesses showing, and the undisputed proof on the trial showed that the granting of these two permits in the light of the existing proration order would result in the drainage of great additional quantities of oil from petitioners' property. The Railroad Commission "must be fair and must not indulge in unreasonable discrimination * * * between different tracts of land in the same field." *Gulf Land Co.* v. *Atlantic Refining Co.*, 131 S. W. (2d) 73, 85. It has the power and duty to distribute the wells and the allowable production as between tracts so that each owner may receive only his just part of the oil and gas. *Brown* v. *Humble Oil and Refining Company*, 83

S. W. (2d) 935; *Rowan and Nichols Oil Co.* v. *Railroad Commission,* 28 Fed. Supp. 131, affirmed 107 F. (2d) 70. The undisputed testimony on the trial showed that if the permit had been conditioned so that the operation of the two Turnbow wells would not have increased the total allowable for the 41 acres from which it was subdivided and of which it is a part for purposes of administering the conservation rules, the injury to petitioners would have been materially lessened (R. 109-110, 142). Therefore, if any basis existed for these two additional wells, nevertheless there was no reason justifying the discrimination and taking of petitioners' property which follows from the unconditional granting of the permit for two wells in the light of the existing proration order. The police power cannot be used as a tool of oppression, nor for the purpose of benefiting one at the expense of another. There was a way open to the Commission to accomplish fully any legitimate objective without placing the permittees in position so greatly to drain petitioners' oil, and in the light of such facts the permit is so unjust, unreasonable, and discriminatory as to petitioners that it violates their rights under the Federal Constitution, for which additional reason the writ should be granted.

WHEREFORE, petitioners respectfully pray that the writ of certiorari be issued to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, to the end that this Court may review and determine this cause on the full and complete transcript of the record and proceedings in the case numbered and entitled on its docket 8842, Humble Oil & Refining Company *et al.,* Appellants, *vs.* W. C. Turnbow *et al.,* Appellees, and that the judgment of said Court of Civil Appeals be reversed by this Honorable Court, and that your petitioners may have such other and

further relief in the premises as to this Honorable Court may seem proper and just.

HUMBLE OIL & REFINING COMPANY,
GULF OIL CORPORATION,
Petitioners,

JOHN E. GREEN, JR.,
JOE S. BROWN,
STANLEY HORNSBY,
R. E. SEAGLER,
H. E. BELL,
J. A. RAUHUT,
Of Counsel for Petitioners.

BEN H. POWELL,
WYMAN S. GIDEON,
Counsel.

Douglas. O

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1033 95

HUMBLE OIL & REFINING COMPANY, ET AL.,
Petitioners,

VS.

W. C. TURNBOW, ET AL.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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No. 1033

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VS.

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PETITIONERS' REPLY TO BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

ADDITIONAL STATEMENT

In view of the insistence of respondents that the Railroad Commission order complained of was supported by substantial evidence before it and their further statement that petitioners do not contend the contrary, and do not attack the "fact findings" made by the Court of Civil Appeals in the instant case, we

submit the following Additional Statement, supplementing those on pages 2-5, 10-13 and 15-21 of the Petition for Writ of Certiorari.

Respondents' Brief, pages 2 and 3, refers to the transcripts of hearings before the Railroad Commission held June 24, 1937, and September 23, 1937 (R. 239-278, 308-343), as containing the testimony referred to and discussed by the Court of Civil Appeals in its opinion, said by that court to support the finding made by the Commission as the basis for its order, that the wells are necessary to prevent waste. (R. 348)

Examination of the transcripts of those hearings shows the only testimony that the wells will prevent waste is the opinion testimony of Turnbow's witnesses Hudnall and Griffin, which is summarized for the Court's convenience on pages 20 to 21 of the Petition for Writ of Certiorari. The basis of their opinion that the wells are necessary to prevent waste is clearly shown by the following excerpt from Griffin's testimony on cross-examination:

> "Q. It is your opinion that it doesn't make any difference how far apart wells are?
> "A. I think the closer together they are the less waste there will be.
> "Q. You think there is no reason for keeping wells spaced widely apart?
> "A. I certainly do not.
> "Q. The closer you drill them, in your opinion, the more oil you will get?
> "A. That is right.
> "Q. You apply that opinion just to this area of the East Texas field?
> "(fol. 867) A. To the entire field.

"Q. The more wells you drill anywhere in the field the more oil you will get?
"A. That is correct." (R. 322)

Testimony of this character is an expression of what is commonly known as the "more wells, more oil" theory. Petitioners duly objected to such opinion testimony at the hearings before the Commission. (R. 251, 252, 312-13, 339-40)

Petitioners' Original Petition in the trial court summarizes in paragraph 8 (R. 15-17) the testimony adduced at said hearings held before the Commission June 24, 1937, and September 23, 1937, respectively. It alleges Turnbow offered testimony by a petroleum geologist at the hearing on June 24, 1937,

> ". . . who admitted that the . . . 41 acre portion of the McGrede tract (disregarding the subdivision of the 2½ acres therefrom) is fully and reasonably protected from drainage by other producing wells thereon, without the drilling or production of either or both of the well locations complained of; that the operation of the two well locations sought by Turnbow would enable him to drain approximately 149,000 barrels of oil from the adjoining leases, including Plaintiff's lease; that in order to lessen such drainage, nine additional wells will be required as offsets on adjacent leases, two of which will be required on Plaintiff's lease; **and while applicants' said witness expressed his private opinion (over objection of this Plaintiff) that the operation of the two locations in controversy would increase the recovery of oil from the field and thereby prevent waste, he admitted that his said opinion was based on the theory that the more wells drilled, the greater will be (fol. 29) the recovery, and on his private**

opinion that there should be no restriction on the number of wells drilled and that the conditions existing in the reservoir at this locality pertaining to the migratory ability of the oil and gas in the sand are not different from the conditions prevailing generally in said field . . ." (R. 15, emphasis ours.)

The petition alleges that Turnbow offered testimony by a petroleum engineer at the hearing on September 23, 1937 (being the only additional testimony offered by him), which engineer

". . . admitted that the . . . 41 acre portion of the McGrede tract (disregarding the subdivision of the 2½ acres therefrom) was then fully and reasonably protected from drainage by other producing wells thereon, (fol. 30) without the drilling or production of either or both of the well locations complained of, and that the operation of said two well locations would enable Defendants Turnbow and W. C. Turnbow Petroleum Corporation to drain large quantities of oil from adjoining leases, including Plaintiff's lease, to lessen which drainage it would be necessary for adjacent lessees to drill a total of seven additional wells as offsets to the well locations in controversy, one of which would be required on Plaintiff's lease; **and while applicants' said witness expressed his private opinion (over objection of this Plaintiff) that the operation of the two locations in controversy would increase the recovery of oil from the field, and thereby prevent waste, he admitted his said opinion was based on the theory that the more wells drilled, the greater would be the ultimate recovery, and not on the existence of any peculiar local conditions in the reservoir in this area, limiting the usual migra-**

tory ability of the oil and gas in the sand, different from such conditions existing generally in the field . . . ." (R. 16-17, emphasis ours.)

Of the order granting permit, paragraph 9 of the petition alleges:

". . . **said order was arbitrarily entered in that there was no evidence whatsoever, and no substantial evidence, introduced at the aforesaid hearing or hearings,** showing or tending to show that the granting of said permit is necessary for the purpose of preventing the confiscation of property or for the purpose of preventing waste of oil and gas within the meaning of the rule applicable to said field . . . " (R. 17, emphasis ours)

Paragraph 10 of the petition attacks the order granting permit as unreasonable, discriminatory and unjust in fact in its operation against plaintiff:

"(f) Because, as shown by the undisputed evidence introduced at said hearing, the drilling of the two wells at the locations specified in the permit herein complained of will enable the owners of mineral interests in said 2½ acres to drain oil in vast quantities from the neighboring leases owned and operated by Plaintiff, which oil said parties have no vested right to be permitted to produce and appropriate, and Plaintiff cannot protect itself against this drainage for the reasons herein more fully shown." (R. 19-20)

* * * *

"(h) There was no evidence offered by applicants before the Railroad Commission showing that the granting of permit to drill and operate the wells in controversy, or either of them is necessary to

prevent waste of oil and gas within the meaning of amended Rule 37, **the opinion of applicants' witnesses** expressed at said hearings **being merely an opinion that the rule under which said exceptions were being sought is an unwise rule, and said testimony was therefore improper and cannot be the basis for granting an exception to said rule,** and was duly objected to by Plaintiff on such ground, and because in fact the operation of the wells in controversy or either of them, will cause a waste of oil and gas within the meaning of said amended Rule 37 for the reasons herein related." (R. 20, emphasis ours)

* * * *

Following the above mentioned allegations in the petition is sub-paragraph (j) of paragraph 10, quoted on pages 10-12 of the Petition for Writ of Certiorari, which is in substance that even if the Commission were entitled to consider the testimony expounding the "more wells, more oil" theory as a basis for granting wells spaced in violation of the rule, nevertheless it had no right to place Turnbow in a position of advantage which would enable him to drain large quantities of petitioners' oil under the guise of conserving oil and gas; that it is the Commission's duty to distribute equitably both the wells and allowable production in such manner as will not give Turnbow an advantage over the adjoining lessees, and the Commission, if authorized to grant the permit, at the same time should have adjusted the allowable production so that the drilling of the two additional wells on the original McGrede 41 acre tract would not increase its allowable, and the granting of the permit without such a provision for petitioners' protection is arbitrary, unreasonable, unjust and discriminatory;

that without such a provision the granting of the two wells in controversy will enable Turnbow to drain and appropriate large quantities of oil from petitioners' lease which petitioners' wells would otherwise produce, and that such an adjustment would have lessened this injury; that under such circumstances the granting of the permit without such a provision is discriminatory and confiscatory, violating petitioners' rights under the 14th amendment. (R. 21-22)

Portions of the petition directed to the point that the subdivisions of the 2½ acres from the 41 acres after adoption of the spacing rule must be disregarded, and when so considered the wells in controvesy were not necessary under the exception "to prevent a confiscation of property," because the 41 acres was fully protected from drainage by wells on adjacent tracts as shown by undisputed evidence before the Commission, are omitted here because the Court of Civil Appeals recognized that the subdivision must be disregarded (133 S. W. (2d) 191, 192; R. 356) and sustained the permit on the sole ground that there was substantial evidence before the Commission that the wells are necessary to prevent waste (R. 356-8).

The Court of Civil Appeals did not file findings of fact, although petitioners requested it to do so (R. 358-364, 365, 353-7; 133 S. W. (2d) 191). It is apparent from a reading of its opinion that the holding that there was substantial evidence before the Commission was a conclusion of law and not a finding of fact.

Respondents are wholly incorrect in stating on page 3 of their brief that the Petition for Writ of Certiorari does not assail the holding of the Court

of Civil Appeals that there was substantial evidence before the Commission. Such holding is expressly attacked in Specification of Error No. 3 (Petition for Writ of Certiorari, pp. 22-3). See also, under "Reasons for Allowance of the Writ," argument and citation of authorities to the effect that testimony of this character has been repeatedly held to be improper and inadmissible (Petition for Writ of Certiorari, pp. 24-26); and the further argument that petitioners should not be deprived of an adjudication of the Federal questions presented merely because the Court of Civil Appeals upheld the permit order on the basis of opinion testimony before the Commission, it being there stated "the holding of the Court of Civil Appeals that testimony attacking the wisdom of the rule is substantial evidence of the right to an exception under the rule is without fair or substantial support in logic or reason." (Petition for Writ of Certiorari, p. 27).

SUMMARY OF ARGUMENT

1. The testimony held by the Court of Civil Appeals to be substantial evidence and upon which respondents rely to support the order granting permit, amounts to an attack on the wisdom of the rule itself, in a proceeding under the rule for an exception; for said testimony was admittedly based on the theory that observance of the minimum spacing provisions of the rule will always cause waste, and violation of those provisions will always prevent waste, and that all wells applied for should be granted as exceptions, thus making the exception become the rule itself. The Commission's sole authority for adopting and enforcing the spacing rule is on the theory that it is

necessary to prevent waste, and the Commission expressly found it to be necessary for such purpose in adopting the rule after having heard the divergent theories on well spacing, and continues to keep said rule in effect and undertakes to enforce it as to others. Numerous decisions of Texas courts hold testimony of the character relied on by respondents in this case is unsubstantial and incompetent to uphold a permit. The provision for granting exceptions to the spacing rule, adopted for general application in the field, implies that exceptional reservoir conditions must exist in order to justify granting of a permit under the exception "where necessary to prevent waste," but it is undisputed that the reservoir conditions around the Turnbow tract are not exceptional but equal or surpass average field conditions. To hold that the Commission may grant exceptions on testimony predicated on the theory that its spacing rule is unwise would subject operators in the field to the unbridled will of the administrative body and permit the Commission to rule the field by administrative fiat. Petitioners seek to prevent the Commission from arbitrarily disregarding, in favor of Turnbow, the standards which the Commission itself set up, and which the Commission at the same time asserts the right to enforce against other similarly situated.

2. It is settled by numerous prior decisions of this court that where the Supreme Court of Texas refuses a Petition for Writ of Error, the petition to this court for a Writ of Certiorari should be directed to the Texas Court of Civil Appeals. The order refusing the Application for Writ of Error does not appear on the face of the record to be a judgment

of the Supreme Court of Texas on the merits. The Court of Civil Appeals has the record, and for that reason, the petition to this court properly requests that Writ of Certiorari be directed to that court. Under the State law, an order of the Supreme Court of Texas refusing Writ of Error is not a judgment disposing of the case on its merits.

ARGUMENT

I.

The testimony offered at the hearing before the Commission on the application for an exception to the spacing rule, to the effect that the more wells you drill and the closer they are spaced anywhere in the field, the more oil will be recovered, is an attack upon the wisdom of the spacing rule, in that it is predicated on the theory that observance of the spacing provisions of the rule will cause waste and violation of said provisions will prevent waste, and is not substantial evidence on which the Commission can lawfully grant an exception to said rule; and there being no other evidence to support the permit, as shown by the opinion of the Court of Civil Appeals, the mere fact that the Commission granted petitioners a "full hearing" does not relieve said order and the judgments upholding it of the objection that the order granting these two wells is arbitrary, denying petitioners equal protection of law and depriving them of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

On the question of whether there was any substantial evidence before the Commission supporting its order granting permit, the holding by the Court of Civil Appeals that the subdivision of the 2½ acres from the 41 acres must be disregarded in administering the rule and the admission by Turnbow's witnesses that the 41 acres as a whole is reasonably protected from drainage and has a slight advantage over the adjacent leases, without the Turnbow wells, eliminates any possibility of sustaining the permit under the exception clause "to prevent confiscation of property," as has been demonstrated on page 24 of the Petition for Writ of Certiorari. The Court of Civil Appeals did not attempt to sustain the permit on that ground of exception, but sustained it under the exception clause "to prevent waste" on the opinion testimony of Hudnall and Griffin that the wells will prevent waste by increasing recovery under the "more wells, more oil" theory.

Whether the order of the Commission granting the permit was supported by substantial evidence introduced at the hearing before the Commission, depends on whether there was substantial evidence before it that these wells are "necessary to prevent waste" **within the meaning of the spacing rule.** And, in view of the undisputed evidence at the hearings before the Commission and on the trial that there are no peculiar conditions in the reservoir in this vicinity distinguishing it from the field generally, but that the local reservoir conditions equal or surpass the average field conditions, the question is reduced to simple form: **Is the personal opinion of Turnbow's witnesses, admittedly based on the theory that the more wells you drill anywhere in the field**

and the closer they are spaced the more oil will be recovered, and that the enforcement of the minimum spacing provisions in the rule, therefore, cause waste in their general application, substantial evidence in a proceeding under the rule for an exception, sufficient in law to support an order granting a permit in exception to the spacing rule which the Commission adopted and keeps in effect for general application to the field?

The holding of the Court of Civil Appeals that this character of testimony was substantial evidence justifying the order granting the exception was a conclusion of law, for the legal effect of evidence is a question of law. **Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 187.** There was no material dispute on the basic facts. The testimony of Turnbow's witnesses at the hearings before the Commission and the testimony of petitioners' witnesses on the trial was not contradictory on basic facts. All agreed that the conditions in the reservoir affecting ability of the wells to drain oil from around them are equal to or better than the average conditions prevailing in the field. The contradiction between petitioners' and respondents' witnesses is in the conclusion or opinion that is to be drawn from those facts. Petitioners' witnesses were of the opinion that the spacing of Turnbow's wells in violation of the 330-660 foot minimum spacing provisions of the Commission's rule, and the close grouping of wells and uneven spacing and uneven withdrawal of oil that will be brought about by offsetting Turnbow's wells, will lessen the ultimate recovery of oil and thus cause waste. Respondents' witnesses, on the other hand, were of the opinion that

the observance of the minimum spacing provisions of the Commission's rule for this field will cause waste anywhere in the field, and that violation of such provisions will prevent waste, on the "more wells, more oil" theory. These theories are direct opposites. Advocates of the "more wells, more oil" theory say all applications for permits should be granted **as exceptions** to the rule, and thus the exception would become the entire rule. But the Railroad Commission has chosen to keep the spacing rule in effect.

Petitioners have contended throughout this case that, the local reservoir conditions not being exceptional, rendering the field rule less applicable to this area than to the field generally, the opinion testimony of Turnbow's witnesses was not substantial evidence supporting the permit under the "waste" exception to the spacing rule, because it "resolves itself into an attack upon the validity of Rule 37, although under the guise of an application for a permit under an exception to the rule," and that such testimony was incompetent **in this proceeding under the rule,** as was unanimously held by the same Court of Civil Appeals in **Railroad Commission vs. Marathon Oil Company, 89 S. W. (2d) 517, 518 (writ of error refused)** and other cases cited on pages 25 and 26 of the Petition for Writ of Certiorari. As reasoned in **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911, 915 (writ dismissed),** "if an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule."

Since respondents' contention that this character of opinion testimony is substantial evidence support-

ing an exception to the spacing rule is the sole basis for their argument that petitioners are not denied equal protection of law and deprived of their property without due process of law, we desire to present in further detail the reasons why such opinion testimony is not "substantial evidence," and to show that the existence of such testimony at the hearings before the Commission did not relieve the courts of the duty of determining the Federal questions raised in this case.

The sole statutory authority for the Railroad Commission's well spacing rule is Articles 6014 and 6029, Ver. Tex. Stats. 1936, which empower the Commission to adopt rules to prevent waste. **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911, 915 (writ of error dismissed).** In adopting this spacing rule prohibiting drilling of wells at lesser distances than 660 feet from other wells and 330 feet from property lines, with provisions for exceptions where necessary to prevent waste or to prevent confiscation of property, the Railroad Commission **expressly found** that said general rule is necessary to prevent waste of oil and gas in the East Texas Field. (See extensive findings to this effect in its orders of September 2, 1931, and February 25, 1932, R. 220-1, 222-5, introduced at R. 46-47, referred to in the Midas case, supra, 123 S. W. (2d) at 915).

In **Sun Oil Company v. Railroad Commission, 68 S. W. (2d) 609, 612** (affirmed 84 S. W. (2d) 447), this same Court of Civil Appeals held:

> "After a full hearing the Railroad Commission determined, and amended its rule 37 accordingly, that wells should be spaced 660 feet apart in that field in order to prevent waste; i. e., one well to

approximately 10 acres of land. According to their own rule, therefore, promulgated after an extensive hearing, wells in closer proximity producing equally would tend to create waste."

* * * *

"The Commission is the duly constituted agency of the state to ascertain what constitutes waste of oil and gas. This it must do after hearings and a careful investigation with reference thereto. And when it has promulgated a general rule, a power expressly delegated to it, after a full and careful consideration of the subject to which such rule relates, as amended rule 37 was, it cannot thereafter even itself arbitrarily grant exceptions thereto which would in effect indubitably destroy the efficacy of the rule itself."

This same Court of Civil Appeals held in **Atlantic Oil Production Company vs. Railroad Commission, et al., 85 S. W. (2d) 655, 657 (writ dismissed):**

"It has been judicially determined by this court that the 660-330 feet spacing rule (37) in the East Texas field, 'promulgated after an extensive hearing,' was in effect an authoritative official finding by the commission that 'wells in closer proximity producing equally would tend to create waste.' Sun Oil Co. v. Railroad Commission (Tex. Civ. App.) 68 S. W. (2d) 609, affirmed (Tex. Com. App.) 84 S. W. (2d) 447.

"The commission cannot arbitrarily grant exceptions to the rules it promulgates under its delegated powers."

There are divergent views on the matter of obtaining the greatest ultimate recovery from the field,

as is demonstrated by the record in this case. Before adopting field rules the Commission held a hearing to determine what rules were necessary to be adopted to prevent waste. Presumably the divergent theories of well spacing were there presented. The Commission adopted the view that a restriction on well spacing, tending to achieve both wide spacing and even distribution of wells, would yield the greatest recovery and prevent the most waste. It incorporated such view in its spacing rule for this field. All of the oil can never be recovered from any field. It is a question of attempting to develop fields in the manner which will yield the greatest possible recovery. From the fact that it has adopted one of the several conflicting theories advanced by geologists and petroleum engineers, it follows that "prevention of waste" has a different concept or meaning, depending upon whose theory is being advanced. A well which one geologist thinks will prevent waste, will, according to the opinion of someone holding a different theory, cause waste instead of preventing waste. Therefore, "prevention of waste," within the meaning of Rule 37 as adopted by the Commission, will differ from the conception of that term possessed by a geologist who thinks that spacing rules are improper and unwise, and that wells drilled in violation of Rule 37 will prevent waste. The geologists and engineers who contend that wells drilled in violation of the general spacing provisions of the rule will prevent waste under the theory of "more wells, more oil," interpret this exception clause as meaning that every well applied for should be granted by the Commission, and that the Commission has the right and duty to grant a permit for each and every well applied for, regardless

of how spaced; and that each permit granted should be sustained on the ground that it is "necessary to prevent waste." The fallacy of this reasoning lies in the fact that they interpret "necessary to prevent waste" according to their own concept of the proper spacing pattern, instead of in the light of the general rule itself. When properly interpreted, in the light of the general rule, this clause does not authorize the granting of each and every well applied for, but only authorizes the closer spacing of wells in those portions of the field where there exist peculiar conditions restricting the migratory ability of the oil and gas below the migratory ability thereof obtaining generally in the field. **Stanolind Oil & Gas Co. v. Midas Oil Co., supra.** When thus construed, both the general rule and the exception clause are reasonable, valid and consistent. The general provisions of the rule import a finding by the Commission that wells closer than 660 feet apart are not necessary to prevent waste in the portions of the field where the usual underground conditions exist, but will cause waste, and that in the portions of the field where unusual conditions exist abnormally restricting the migratory ability of the oil and gas, closer spacing of wells may be permitted upon a showing of such peculiar conditions.

This court has before it the unusual spectacle of the Railroad Commission granting a permit for an exception on opinion testimony, to the effect that the more wells you drill and the closer they are spaced anywhere in the field, the more oil will be recovered, regardless of whether the locations comply with the minimum spacing provisions of its field rule, and regardless of whether exceptional reservoir conditions exist in the vicinity, which is in substance that

observance of the rule in all instances tends to cause waste, and that violation of the rule in all instances tends to prevent waste. The situation is rendered more bizarre by the fact that the Commission, in adopting this rule, expressly found that its minimum spacing provisions are necessary to prevent waste, and by the fact that the Commission has no statutory authority either to adopt or continue this rule in effect except on the theory that it is necessary to prevent waste. Because of the obvious inconsistency, we deem it appropriate to review briefly the history of the Railroad Commission's actions and the decisions of the courts with respect to this point, to aid this court in judging (1) whether the protection of petitioners' rights should be left to the final determination of the Commission in this case, and (2) whether testimony of the character relied upon by the respondents is "substantial evidence," which will justify the confiscation of petitioners' property and the denial to them of equal protection of the law.

The first decision by the Supreme Court of Texas in a "Rule 37 case" was that in **Brown, et al., vs. Humble Oil & Refining Company, 83 S. W. (2d) 935,** decided June 12, 1935, in which case said court held invalid a permit order which had been issued by the Railroad Commission and used the following language in its opinion:

> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such

subdivisions drilled after the adoption of the rule; but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." 83 S. W. (2d) 944.

* * * *

"The decisions of the Railroad Commission on this question must be based upon proof, and must not be capricious or unreasonable. The mere holding of a hearing does not justify its action. If after a hearing the commission acts without regard to the evidence, or makes a ruling wholly unsupported by the evidence, it cannot be said to have exercised its discretion. And where it is shown that the commission has abused its discretion, or has acted illegally and issued a permit in violation of its rules, the courts are fully authorized to nullify the permit of the commission and prevent its enforcement. Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. (2d) 505; 42 Corpus Juris, pp. 691, 692." (83 S. W. (2d) 945).

Between the time the above mentioned opinion was handed down on June 12, 1935, and the time when the Supreme Court overruled Motion for Rehearing on November 27, 1935 (87 S. W. (2d) 1069), the Railroad Commission struck back at this judicial limitation of its authority by a recital in its proration order of August 26, 1935, quoted as follows in **Railroad Commission vs. Marathon Oil Company, 89 S. W. (2d) 517, 519** (opinion dated December 16, 1935):

"It is stated in appellants' brief that the commission, after an extensive hearing, made the following findings on August 26, 1935:

'We further find from the evidence the more wells that are drilled the greater will be the ultimate recovery of oil or gas from any given pool.

'The hearing just closed raises grave doubts as to the wisdom or value of any Rule 37 in preventing waste or in aid of the recovery of oil, except in the instances of certain new fields, and then only as a prevention of fire hazards and blowout dangers'." (89 S. W. (2d) 519)

The quoted statement may be said to imply a threat that the spacing rule would be abolished if there were too much "judicial interference" with its permit orders.

According to the opinion in the Marathon case, just cited the Railroad Commission had granted one Adams permit for a fourth well on a 10 acre tract which had a spacing advantage and a density advantage over the adjacent leases, and the court held that Adams had at least an equal drainage opportunity, that there was no basis for granting an exception to the rule for well No. 4, and that the Commission exceeded its powers in granting the permit (89 S. W. (2d) 517, 518). The Commission in that case sought to sustain its order granting the permit on the theory that the well was necessary in order to prevent waste, referring the Court to the Commission's "finding" above quoted, and employing the same character of testimony and reasoning which the Commission employed in granting the permit to Turnbow, et al.,

in this case. Further quoting from the opinion in the Marathon case:

> "The only theory advanced in support of the Commission's order is embodied in the testimony of the Geologist Hudnall, to the effect that the drilling of the Adams No. 4 would result in the ultimate recovery of a greater proportion of the recoverable oil from the tract. This was based upon the theory that, 'in general with the closer spacing of wells and the more densely the wells are drilled, the higher will be the percentage of recovery in the East Texas oil field.' The effect of his testimony is summed up in the following question to which he gave an unqualified affirmative answer: 'Based upon that theory, Mr. Hudnall, of course the Railroad Commission would have to grant every application that is presented to the Railroad Commission for the drilling of additional wells; if it were the law that an applicant would be entitled to a well every time he could show that if he did not get the permit that there would be some oil left in the ground that he could recover through that well?'" (89 S. W. (2d) 518-19)

(Here followed the quotation from the Commission's order of August 26, 1935)

> "In the last analysis the position of appellant resolves itself into an attack upon the validity of rule 37, although under the guise of an application for a permit as an exception to the rule."
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> * * * *
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> "With the wisdom or policy of rule 37 the courts are not concerned. These are issues which address themselves exclusively to the Railroad

Commission, whose action is subject to review by the courts only in a direct proceeding, and then only to determine whether its action has reasonable factual basis for its support. The resolving of divergent conclusions arrived at from conflicting theories and opinions of experts are issues solely within the commission's jurisdiction. See Brown v. Humble Oil & Refining Co. (Tex. Sup.) 83 S. W. (2d) 935, 99 A. L. R. 1107, on rehearing (Tex. Sup.) 87 S. W. (2d) 1069; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.) 49 S. W. (2d) 837.

"The commission has the power to modify, amend, or even abrogate the rule (37), whenever, in its judgment, this should be done in the interest of a proper administration of the conservation laws of the state. But until such action, or until the rule is set aside in a direct proceeding instituted for that purpose, it is the imperative duty of the courts to enforce it, notwithstanding any expression of doubt on the part of the commission as to its wisdom, propriety, or effectiveness to accomplish its objective." (89 S. W. (2d) 519)

Thereupon the Court of Civil Appeals affirmed the judgment of the trial court cancelling the order granting permit, and the Commission failed in its attempt to sustain itself by the "more wells, more oil" argument.

The next significant development in the judicial history of this question was the case of **Whittington vs. Lon A. Smith, et al., 16 Fed. Supp. 448**, opinion dated August 18, 1936, in which Whittington attacked the spacing rule itself as unconstitutional. With this attack coming up for trial, the Railroad Commission found itself in the unenviable position of having de-

cared, in effect, by the recitals in its order dated August 26, 1935, that Rule 37 has no foundation in fact in so far as preventing waste is concerned, except in a few fields where there is a danger of blow-outs, inapplicable to the East Texas field. So, with the Whittington case coming up for trial, the Commission entered another general order dated February 4, 1936, containing some more recitations by which the Commission undertook to put itself back into some semblance of good legal position by explaining what it meant by the language in its order of August 26, 1935, and we quote this new order of February 4, 1936, from the opinion in **Magnolia Petroleum Company vs. Railroad Commission, 93 S. W. (2d) 587, 588,** as follows:

> "It may not be amiss in this connection to direct attention to the fact that the commission in its order of February 4, 1936, clarified the views expressed in the quotation in the Marathon Case from its order of August 26, 1935, as follows:
>
> " 'By this language the Commission did not mean and did not find from the evidence that the closer wells are drilled the greater will be the ultimate recovery of oil and gas from any given pool, but by such language only meant and found from the evidence that the more wells that are drilled in conformity with the spacing rules as applicable to the various fields in Texas the greater will be the ultimate recovery of oil and/or gas from any given pool.
>
> " 'It was not then the intention and it is not now the intention of the Railroad Commission to abrogate or abandon any of the spacing rules now in effect and applicable to the various oil

> and gas fields in Texas, nor to militate against the fact basis on which the Commission's spacing rules are based'."

Thus, by this order the Railroad Commission got back on the other side of the fence and contended that the observance of its spacing rule was necessary to prevent waste; and it succeeded in defeating the attack on the validity of the rule in the Whittington case.

The Commission was consistent with its position in the Whittington case in two other cases which involved validity of Commission orders **denying** drilling permits, decided in the interim after the decision in the Marathon case and prior to the decision in the Whittington case. In the first of these cases, **Arkansas Fuel Oil Company, et al. vs. Reprimo Oil Company, 91 S. W. (2d) 381** (writ dismissed), the Commission had denied Reprimo permit to drill a second well on a 5 acre tract, and Reprimo sought to enjoin the Commission from interfering with the drilling of said well. The Railroad Commission successfully contended that its order denying permit should be sustained because the "more wells, more oil" testimony, absent peculiar local conditions in the reservoir, is not substantial evidence justifying a permit, and we quote as follows from the opinion in that case:

> "Appellee's witness gave it as his opinion that the more wells were drilled, the more oil would be recovered; that two on appellee's land would ultimately produce more than one. There are no facts present here of any peculiar local geological structures or other factors which would operate to cause waste if a second well is not drilled and

operated. The above opinion of the witness is perhaps the strongest testimony in this record to sustain the necessity of a second well to prevent waste. No facts are given to support it. It is in precise opposition to the terms of rule 37, requiring the spacing of wells to be 660 feet by 330 feet. Of this it was said by the Austin court: It has been judicially determined by this court that the 660-330 spacing rule (Rule 37) in the East Texas field 'promulgated after an extensive hearing,' was in effect an official authoritative finding by the Commission that 'wells in closer proximity producing equally would tend to create waste.' Sun Oil Co. vs. Railroad Commission (Tex. Civ. App.) 68 S. W. (2d) 609, 612, affirmed Bennett vs. Sun Oil Co. (Tex. Sup.) 84 S. W. (2d) 693." (91 S. W. (2d) 384)

In the second of these cases, **Magnolia Petroleum Company vs. Railroad Commission, 93 S. W. (2d) 587 (writ refused),** decided April 8, 1936, the Railroad Commission had denied Magnolia Petroleum Company permit to drill well No. 10 on an 84.12 acre lease in East Texas, and Magnolia filed suit against the Commission seeking to enjoin it from interfering with Magnolia in the drilling of the well. The well location was 330 feet and 304.8 feet, respectively, from the nearest lines and 256 feet from the nearest well (93 S. W. (2d) 587), and was, therefore farther from adjacent lines and wells than the two Turnbow locations involved in this case. Magnolia contended, among other grounds, that the Commission wrongfully refused the permit because:

"3. The additional well tended to decrease waste, and therefore to conserve the oil in the field in that its effect would be to increase the ultimate recovery from the field."

Regarding the evidence on this point, the opinion states:

> "There was also testimony analogous to that in Railroad Commission v. Marathon Oil Co. (Tex. Civ. App.) 89 S. W. (2d) 517 (error ref.), to the effect that the ultimate recovery from the field would be enhanced by increased density in drilling."

But the Court sustained the Railroad Commission's contention that testimony of that character did not justify the permit to drill the wells in exception to the spacing rule, and sustained the order of the Railroad Commission denying permit.

In the subsequent case of **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911,** in which the Railroad Commission was an appellee, Stanolind sought to annul an order of the Commission granting Midas a permit to drill a second well on 2.14 acres of land on the ground that the permit was not necessary to prevent either confiscation or waste, and the Railroad Commission sought to sustain its order granting permit. Quoting from the opinion:

> "The contention is made that the recital above quoted of the order of August 26, 1935, amounts to an official finding by the Commission against the efficacy of the spacing provisions of the rule. Notwithstanding the above quoted recital, however, the Commission has not amended nor modified these spacing provisions of the rule itself; and obviously realizing that such above quoted recitals, taken alone and if considered as an official finding, probably operated to nullify the rule unless the spacings then provided by the

rule were reduced, the Commission in its order of February 4, 1936, in effect repudiated the recital of its order of August 26, 1935, in the following language (See Magnolia Pet. Co. vs. Railroad Com., Tex. Civ. App., 93 S. W. (2d) 587, 588):

"'By this language the Commission did not mean and did not find from the evidence that the closer wells are drilled the greater will be the ultimate recovery of oil and gas from any given pool, but by such language only meant and found from the evidence that the more wells that are drilled in conformity with the spacing rules as applicable to the various fields in Texas the greater will be the ultimate recovery of oil and/or gas from any given pool.

"'It was not then the intention and it is not now the intention of the Railroad Commission to abrogate or abandon any of the spacing rules now in effect and applicable to the various oil and gas fields in Texas, nor to militate against the fact basis on which the Commission's spacing rules are based.'

"The writer interprets the above as a repudiation by the Commission itself of the so-called finding of August 25, 1935, and a reaffirmation of 'the fact basis on which the Commission's spacing rules are based.' This fact basis was recited, in the order of September 2, 1931, as the reason for increasing the spacing distances in the East Texas field from 150-300 to 330-660 feet, to be to prevent 'actual physical waste of oil and gas.' That is the extent of the power vested in the Commission by the Legislature. See Arts. 6014 and 6029, R. C. S., as amended, Vernon's Ann. Civ. St. Arts. 6014 and 6029. **If there be no reasonable relationship, therefore, between the**

> **spacing provisions of the rule and the prevention of waste, such spacings become purely arbitrary,** and the Commission has exceeded its authority in prescribing them. The validity of the rule has been repeatedly upheld. The very term 'exception' thereto necessarily implies a deviation or departure from the general rule. **If an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule. That is, that underground conditions, e. g., sand thickness, saturation, porosity, permeability, well potentials, bottom hole pressure, and drainage in the area of the particular well, differ from those obtaining generally, and on which the rule itself is predicated.** (Emphasis ours, 123 S. W. (2d) 911, 915)

Thus, in the Midas case, the Railroad Commission was again adhering to the "more wells, more oil" theory, which position, if sustained, would have upheld its permit order under attack in that case.

The history of Rule 37 in the East Texas Field and of the permit litigation involving said rule shows that the Railroad Commission has alternately adhered to and disavowed the "more wells, more oil" theory, depending on which position was best suited to sustaining its particular order under fire in the successive lawsuits; and it has likewise insisted that opinion testimony of the kind here involved is "substantial" or "unsubstantial" depending on whether it was being offered for or against the Commission's position. In the case at bar respondents, including the Railroad Commission, pass over this point with the terse statement that the opinion of Hudnall and Griffin was "substantial evidence," and that petitioners' rights under the Fourteenth Amendment are not violated because the Commission gave them a "full hearing."

They suggest no reason why an exception to the spacing rule is justified in law on the mere private opinion of their witnesses that the spacing rule is unwise, and we submit that no reason for its position is apparent except that the Commission again desires to have its order upheld.

The Railroad Commission is a party to another lawsuit involving its handling of the East Texas Field **(Railroad Commission of Texas, et al., vs. Rowan & Nichols Oil Company, 60 S. Ct. 1021)** now pending in this Court on motion for rehearing, and it is interesting to compare the position being taken by the Commission in that case with its position in this case. In the **Rowan & Nichols case,** according to the Commission's brief therein, Rowan & Nichols Oil Company had a 24.99 acre lease with 5 wells and sought an adjustment of its allowable and in the alternative sought permit to drill 20 additional wells on its lease. The Commission apparently ignored the application for adjustment of allowable, but granted Rowan & Nichols Oil Company a permit to drill only one of the additional wells requested (see pages 6 and 10, Railroad Commission's brief, Rowan & Nichols case). If the Commission believes in the position it now asserts in the Turnbow case, that the more wells drilled and the closer they are spaced, the more oil will be recovered and waste will be thereby prevented, is it not remarkable that the Commission did not grant Rowan & Nichols permit for 20 wells? In its brief in the Rowan & Nichols case, the Railroad Commission further contends, page 47, that the proration order, which is substantially on a per-well basis, does not operate to favor densely drilled tracts, because the Commission undertakes to distribute the

wells on an acreage basis. Quoting from the Commission's brief therein:

> "With reference to the objection that the proration order favors densely drilled tracts, it should be pointed out, first that while the proration order does not expressly take acreage into consideration, the acreage of each lease is considered by the Railroad Commission in its spacing rules, which must be construed together with its proration orders. In other words, the more acreage an operator has, the more wells he may drill, thereby obtaining a larger allowable for his lease." (page 47)
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> "The Commission generally has tried to permit each landowner to obtain substantial justice by drilling to substantially the same density as the area surrounding his lease. . . . This is illustrated by the respondent's lease, which at present is about as densely drilled as the surrounding area and the average of the field as a whole, even without drilling its sixth well." (pages 49-50)

If the Commission were actually attempting to distribute the wells between the operators in proportion to their acreage so that each would receive his fair share of the oil under the per-well proration order, why did it grant the 41 acre tract in this case two more wells when it already had a density and allowable per acre advantage over the surrounding area, and why did it grant Turnbow two wells on the 2½ acre portion of the 41 acres, giving him a density of 1.25 acres per well and a daily allowable per acre of 16 barrels (R. 105-6), which is approximately a

4 to 1 advantage over the surrounding area drilled to an average density of more than 5 acres per well and having an average daily allowable per acre of less than 4 barrels? (R. 91-3, 350A, 351) It appears to us that the Railroad Commission has now carried its contentions to the point where it is taking opposite positions before the same court at the same time, and we submit this as an added reason why this court should carefully examine the soundness of the position which the Commission is taking in this case.

We submit that the evidence relied upon by the Commission in granting the permit under the waste exception clause was not substantial, and that the courts below erred in sustaining the permit on the basis of that testimony. Substantial evidence has been defined by Judge Learned Hand as ". . . . the kind of evidence on which responsible persons are accustomed to rely in serious affairs." **N. L. R. B. vs. Remington Rand, Inc., 94 Fed. (2d) 862, 873, Cert. denied, 304 U. S. 576, 58 Sup. Ct. 1046.** The term "substantial evidence" at least implies that the evidence must possess something of substance, must be competent, and such as would appeal to reasonable minds. **Consolidated Edison Co. vs. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 217.** To say that an exception to the field spacing rule should be granted merely because an individual appears before the Commission and expresses the opinion that the rule is unwise and that every well applied for should be granted as an exception to the rule, presents an irrational contradiction on its face. It is an anomalous thing that the Commission, in the exercise of its statutory duty to prevent waste, and having found that the spacing rule is necessary for that purpose, would grant ex-

ceptions to the rule on the basis of testimony to the effect that its spacing rule is unwise, yet leaving the spacing rule in effect and undertaking to enforce it against petitioners and others in the field. This is a contradictory position which does not appeal to reasonable minds. The courts of Texas have repeatedly held this character of testimony is not competent in a proceeding under the rule for an exception to the rule, because it attacks the wisdom of the rule on which the proceeding is based. Surely this cannot be said to be "substantial evidence."

In this connection we call attention to the holding of the Supreme Court of Texas in **Brown vs. Humble Oil & Refining Company, 89 S. W. (2d) 935, 945,** to the effect that in a proceeding to determine rights by virtue of the exceptions contained in the spacing rule, those who receive and hold benefits under the rule are not in position to attack the validity of it.

In **Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185,** it was contended that the courts could not set aside an order of the Interstate Commerce Commission "even if the finding was wholly without substantial evidence to support it," and this court overruled that contention with the following significant language:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean, that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however

> beneficently exercised in one case could be injuriously exerted in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power." (33 S. Ct. 186)

The Interstate Commerce Commission further insisted that its findings must be presumed to have been supported by information it had gathered in its official capacity, even though not formally proved at the hearings. This court likewise overruled that contention, holding the Commissioners could not act upon their own information, because when the Commission acts in a quasi-judicial capacity, all parties must be fully apprised of the evidence and given an opportunity to cross examine witnesses, inspect documents and offer evidence in explanation or rebuttal, hence that the court will test the sufficiency of the evidence on the basis of that which was introduced at the hearing, and on that point this court stated:

> "In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." (33 S. Ct. 187-188)

The theory underlying this decision was to protect individuals against arbitrary acts of the administrative body. We submit this same underlying theory supports our contention that an exception to the Railroad Commission's spacing rule for the East Texas Field cannot be sustained, in an area where no exceptional reservoir conditions exist, on opinion testimony

to the effect that observance of the spacing provisions of the rule causes waste, and that violation of the rule prevents waste. For, if a permit is to be sustained on that sort of testimony, the Railroad Commission could proceed to grant permits whenever it chooses to do so, and yet deny permits to others similarly situated, and ask the court to sustain its order in the first situation on the ground that such opinion testimony is substantial, and likewise insist the court should sustain its order denying permit in the second situation on the ground that such evidence is unsubstantial, as it has done in cases cited. Under such circumstances the citizen's protection against arbitrary action of the administrative body is destroyed, and he and his property are subjected to the unbridled will of the administrative body, and the way is left open to the Commission to rule the East Texas Field by administrative fiat. Any permit arbitrarily granted by the Commission would be sustainable on the "more wells, more oil" theory, if such constitutes substantial evidence.

The purpose of the prevailing policy relaxing rules of evidence in proceedings before administrative boards is to abolish form rather than substance. If the order granting the permit in this case is sustainable on opinion testimony that the general rule itself is unwise, we submit that substance also has been abolished.

John Foster Dulles states in his article on "Administrative Law", 25 A.B.A.J. 275, 280:

> "As a practical matter it is only in rare cases that the court review serves any substantial purpose. The potentiality of such review is, of course, enormously valuable as tending to lead commis-

> sions to comply, at least in form and generally in substance, with those basic procedural requirement of 'fair play', which the Supreme Court has several times annunciated, notably in the **Morgan** case (304 U. S. 1, (1938)) . . . . ."

His statement is well illustrated by the case at bar. In the prior suit **(Turnbow, et al. vs. Barnsdall Oil Company, 99 S. W. (2d) 1096)**, the Commission had granted Turnbow a permit for these same wells without bothering to give notice and hearing, and the permit was cancelled on that ground. Thus, the Commission was forced to obey **form.** From the record in this case, it appears that the Commission after having fully complied with form, by giving notice and a "full hearing", has now disregarded **substance** in order again to grant Turnbow the right to continue to operate the wells which the Commission originally permitted **ex parte.**

Petitioners' position in this case does not violate the rule that the courts should not substitute notions of expediency and fairness for those of the Commission. Petitioners merely seek to prevent the Commission from arbitrarily disregarding, in favor of Turnbow, standards which the Commission itself set up, and which standards the Commission at the same time asserts the right to enforce against others similarly situated.

II.

The filing in the Supreme Court of Texas of petitioners' Application for Writ of Error did not admit the cause into the Supreme Court and the refusal thereof does not amount to a determination of the cause on its merits, and the judgment of the Court of

Civil Appeals, which has the record, is the last judgment entered and is that of the highest court of the State in which a decision could be had. Therefore, the petition properly seeks a Writ of Certiorari to be directed to the Court of Civil Appeals.

The question raised by Point Two of Respondents' Brief has been settled against them by a long line of prior decisions of this Court in cases which have come to this Court directly from Courts of Civil Appeals of Texas after the Supreme Court of Texas had refused writ of error, establishing since 1893 as an invariable rule applicable to cases coming from Texas, that in such a situation the writ of certiorari should be directed to the Court of Civil Appeals, or the appeal should be from that court to this court, as the case may be:

Stanley v. Schwalby, 162 U. S. 255;
Bacon v. Texas, 163 U. S. 207;
Roller v. Holly, 176 U. S. 398;
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28;
M. K. & T. Ry. Co. v. Ferris, 179 U. S. 602;
Smith v. St. L. & S. W. Ry. Co., 181 U. S. 248;
Waggoner v. Flack, 188 U. S. 595;
Pardee v. Aldridge, 189 U. S. 429;
Greer County v. Texas, 197 U. S. 235;
H. & T. C. Ry. Co. v. Mayes, 201 U. S. 321;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86;
A. T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55;
Morgan's La. & T. R. & S. S. Co. v. Street, 217 U. S. 599;
M. K. & T. Ry. Co. v. Bailey, 220 U. S. 608;
M. K. & T. Ry. Co. v. Richardson, 220 U. S. 601;
T. & N. O. R. Co. v. Gross, 221 U. S. 417;
T. & N. O. R. Co. v. Miller, 221 U. S. 408;
Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

G. H. & S. A. Ry. Co. v. Crow, 223 U. S. 481;
G. H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481;
T. & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111;
M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657;
G. C. & S. F. Ry. Co. v. McGinnis, 228 U. S. 173;
St. L. S. F. & T. Ry. Co. v. Seale, 229 U. S. 156;
Downman v. Texas, 231 U. S. 353;
Paris & Gt. North. R. Co. v. Boston, 231 U. S. 742;
Pacific Exp. Co. v. Rudman, 234 U. S. 752;
S. A. & A. P. R. Co. v. Waggoner, 241 U. S. 476;
Knights of Pythias vs. Mims, 241 U. S. 574;
M. K. & T. Ry. Co. v. Cassady, 242 U. S. 611;
St. L. S. F. & T. Ry. Co. v. Smith, 243 U. S. 630;
M. K. & T. Ry Co. v. Ward, 244 U. S. 383;
G. C. & S. F. Ry. Co. v. Texas Packing Co., 244 U. S. 31;
G. C. & S. F. Ry. Co. v. Vasbinder, 245 U. S. 635;
M. K. & T. R. Co. v. Texas, 245 U. S. 484;
G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58;
I. & G. N. R. Co. v. Anderson County, 246 U. S. 424;
York Mfg. Co. v. Colley, 247 U. S. 21;
Southern Pac. Co. v. Berkshire, 254 U. S. 415;
City Nat. Bank v. El Paso & N. E. R. Co., 262 U. S. 695;
Cobb Brick Co. v. Lindsay, 275 U. S. 491;
I-G. N. R. Co. v. R. R. Com., 275 U. S. 503;
M. K. & T. R. Co. v. Texas, 275 U. S. 494;
Danciger & Emerick Oil Co. v. Smith, 276 U. S. 542;
T. & P. R. Co. v. Guidry, 280 U. S. 531;
Barwise, et al, Trustees, v. Sheppard, 299 U. S. 33;
Texas & N. O. R. Co. v. Neill, 301 U. S. 674 (granting certiorari);
United Gas Public Service Co. v. Texas (the

Laredo Gas case), 301 U. S. 667 (overruling motion to dismiss appeal).

Lone Star Gas Co. v. State of Texas, 304 U. S. 224, 58 S. Ct. 883; Memorandum opinion, 58 S. Ct. 748.

In the two cases last cited the same contentions as are now urged by respondents, based on cases coming to this court from Ohio where the state practice is different, were urged by motions to dismiss, and were expressly overruled by this court. In Texas, the cause is admitted to the Supreme Court of Texas only in the instance where writ of error is granted, and under the express provisions of the statute (Art. 1750, Rev. Civ. Stats. of Texas, 1925) the effect of refusal of an application for writ of error is to deny admission of the cause to that court.

The order refusing the application for writ of error does not "appear on the face of the record" to be a judgment of the Supreme Court of Texas on the merits. Said order does not recite a hearing of the cause, but merely a hearing of and refusal of the application for the writ. (R. 368-369). It is the settled rule of this Court that where the court of last resort of the State declines to allow an appeal or writ of error from a lower State court, this Court will not treat such action as an affirmance on the merits of the judgment below except where this plainly appears "on the face of the record . . . in express terms of the judgment or decree sought to be reviewed." **Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 269.** Even had the Supreme Court of Texas stated, as reason for its refusal to review the judgment of the Court of Civil Appeals, that it believed its judgment is correct, it would not "take from the refusal its os-

tensible character of declining jurisdiction." **American Railway Express Co. v. Levee, 263 U. S. 19, 21; Western Union Tel. Co. v. Crovo, 220 U. S. 364, 366.** This Court took jurisdiction of the following cases coming directly from the Courts of Civil Appeals where the Texas Supreme Court had accompanied its order of refusal by an opinion stating its reason for refusing to review the case and showing its concurrence in the views of the court below: **M. K. & T. R. Co. v. Texas, 245 U. S. 484 (same case, 107 Texas 540); G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58 (same case, 107 Texas 544); M. K. & T. R. Co. v. Cassady, 242 U. S. 611 (same case, 108 Texas 461); T. & N. O. R. Co. v. Neill, 301 U. S. 674 (same case, 128 Texas 580, 100 S. W. (2d) 348).**

The Court of Civil Appeals has the record, and for that reason petitioners have properly requested that the Writ of Certiorari be directed to that court. The record sent to this court is duly certified by the Clerk of the Court of Civil Appeals. Under Art. 1743, Rev. Civ. Stats. of Texas, 1925, when an Application for Writ of Error is filed, the Clerk of the Court of Civil Appeals sends the record to the Supreme Court; and under Rule 4 of the Supreme Court of Texas, after that court's refusal of a Writ of Error has become final, its Clerk returns to the Court of Civil Appeals "the papers which belong to that court" retaining the Petition for Writ of Error. (121 Texas 748). Since the record permanently remains in the Court of Civil Appeals, the writ is properly requested to be directed to that court. **Stanley v. Schwalby, 162 U. S. 255, 269.**

Under the State law an order of the Supreme Court of Texas refusing Writ of Error is not a judgment

disposing of the case on its merits. It is a discretionary denial of "the right to entrance" to the Supreme Court of Texas. **S. A. & A. P. Ry. Co. v. Blair, 108 Texas 434, 439; Gatz v. City of Kerrville, 121 Texas 92.** When the Supreme Court's action in refusing the writ becomes final, certified copies of the order of the court are forwarded to the Court of Civil Appeals and the record is returned; and then the clerk of that court is empowered to issue the mandate of that court to enforce its judgment. (Article 1864; Rule 66, of the Courts of Civil Appeals, 102 Texas xxxvi.) The mandate of the Supreme Court will issue, not to enforce its orders refusing writs of error, but only its final judgments. (Article 1773, Rev. Civ. Stats 1925.)

WHEREFORE, petitioners pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1033 95

HUMBLE OIL & REFINING COMPANY, ET AL.,
Petitioners

VS.

W. C. TURNBOW, ET AL.

Brief of Respondents, W. C. Turnbow, W. C. Turnbow Petroleum Corporation and the Railroad Commission of Texas in Opposition to the Petition for Writ of Certiorari

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AUTHORITIES.

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

I.

Additional Statement

Respondents, W. C. Turnbow, W. C. Turnbow Petroleum Corporation, and the Railroad Commission of Texas, submit the following additional and corrective statement:

1. The material facts involved in this case appear in the opinion of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas (R. 353). This case is reported in 133 S. W. (2d) 191. The findings of fact made by the Commission in its order here under attack are set forth in said opinion (R. 354, 355), and the Court found in its opinion that the Railroad Commission of Texas, the administrative body, had held four hearings with respect to the two wells or permits in question, and that on the last hearing before the Railroad Commission of Texas, on September 23, 1937, the petitioners in this court, Humble Oil and Refining Company and Gulf Oil Corporation, requested the Commission to consider and the Commission considered, all the records and evidence before it on the three previous hearings, and also received much evidence on both the issue of confiscation and the issue of waste, and that in the trial court, on appeal from the Commission order granting the permits pursuant to said hearing on September 23, 1937, the petitioners in this court introduced a complete transcript of all proceedings and evidence had and adduced on the four hearings before the Commission, and also introduced the testimony of two expert geologists, which, on the whole, was merely contradictory of, or in conflict with, the testimony of the two expert geologists who testified on the last two hearings before the Commission. (R. 356, 357.) The testimony of the expert witnesses before the Railroad Commission of Texas, the administrative body issuing the order complained of by petitioners (R. 239-270A, 308-343), was referred to and discussed by the Court of Civil Appeals

in and for the Third Supreme Judicial District of Texas in its opinion (R. 357), and this testimony supports the findings of fact made by the Commission as a basis for its order.

Petitioners do not assail in their petition for writ of certiorari the fact findings made by the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas in the instant case.

The findings of said Court of Civil Appeals, its opinion and judgment (R. 353, 358) were approved by the action of the Supreme Court of Texas in refusing writ of error (R. 368, 369); Art. 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts 1927, 40th Legislature, p. 214, ch. 144, sec. 1.

2. Petitioners apply to this court for a writ of certiorari directed to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas to review a judgment of said court, dated October 18, 1939. The record shows that petitioners on November 2, 1939, filed their motion for rehearing and Request for Findings of Fact and Conclusions of Law in said Court of Civil Appeals (R. 358, 364), and that said court entertained and overruled said motion on November 15, 1939 (R. 365); that petitioners thereafter and on December 15, 1939, filed their petition to the Texas Supreme Court for a writ of error (R. 365) and that same was entertained and refused on January 3, 1940.

Petitioners concede in their petition for writ of certiorari to this court (page 5) that this case was one within the appellate jurisdiction of the Texas

Supreme Court under and by virtue of Article 1728 of the Civil Statutes of Texas.

Article 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts of 1927, 40th Legislature, page 214, chapter 144, section 1, confers on the Supreme Court of Texas appellate jurisdiction co-extensive with the limits of the state, extending to all questions of law when same have been brought to the Court of Civil Appeals from final judgments of trial courts in cases of this character, and said article further provides that:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

The action of the Supreme Court in refusing writ of error being an approval by the Supreme Court of Texas both of the judgment and opinion of the Court of Civil Appeals, said action operates as and is an affirmance of the judgment and decision of the Court of Civil Appeals, and the Supreme Court of Texas is the highest court of the state in which a decision could be had and a writ of certiorari may not be directed to the intermediate appellate court.

II.

Summary of Argument

1. Petitioners were not denied the equal protection of the law and deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because it affirmatively appears both from the record and petitioners' petition for writ of certiorari herein that petitioners were accorded a full hearing before the administrative body and that the action of the administrative body was supported by substantial evidence.

2. The Supreme Court of Texas, having refused petitioners' application for writ of error in this cause, which said refusal is by virtue of the statutes of the State of Texas an approval both of the judgment and decision and opinion of the Court of Civil Appeals, is the highest court of the state in which a decision could be had, and a writ of certiorari may not be directed to the Court of Civil Appeals, an intermediate appellate court.

Argument

Point One

Petitioners were not denied the equal protection of the law and deprived of their property without due process of law in violation of Fourteenth Amendment to the Constitution of the United States because it affirmatively appears both from the record

and petitioners' petition for writ of certiorari herein that petitioners were accorded a full hearing before the administrative body and that the action of the administrative body was supported by substantial evidence.

Jurisdiction of this court is attempted to be invoked on the ground that there is a substantial federal question involved, that petitioners are being deprived of their property without due process of law. The record shows and the petitioners admit in their petition for writ of certiorari herein that there has been a full hearing before the Railroad Commission of Texas, the administrative body issuing the order complained of, upon notice, at which hearing petitioners' evidence was received and weighed, and that after the Commission promulgated the order complained of, they had, on their own petition, a judicial hearing, at which hearing a complete transcript of the proceedings and evidence had and adduced on the four hearings before the Railroad Commission of Texas was introduced in evidence. Petitioners do not assert or contend that the fact findings made by the Commission in the order under attack were not supported by substantial evidence before the Commission, and the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, in the opinion complained of by petitioners, found that the findings of the Commission were supported by substantial evidence. This procedure clearly satisfies the demands of the Federal Constitution and there was no lack of due process. *United Gas Public Service Company v. State of Texas*, 303

U. S. 123, 138, 139. *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 139, 59 S. Ct. 754, 761; *Railroad Commission of Texas, et al., v. Rowan & Nichols Oil Company*, — U. S. ——, not yet reported, opinion delivered June 3, 1940.

Petitioners cite in support of their petition for writ of certiorari *Railroad Commission, et al., v. Rowan & Nichols Oil Company*, 107 Fed. (2d) 70 (Circuit Court of Appeals, 5th Circuit) and the opinion of the United States District Court in said case reported in 28 Fed. Supp. 131. This court by its opinion in this case delivered June 3, 1940, reversed the judgment and decision of the Circuit Court of Appeals and of the United States District Court, and held that a controversy such as the one under consideration always called for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which guided the agencies to whom the formulation and execution of policy have been entrusted and that

"* * * Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Compare S. C. Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 191, et seq."

In the instant case the order of the Railroad Commission of Texas complained of by petitioners (R. 347) was rendered after a full hearing, upon notice

(R. 307), and the testimony and argument was preserved in a written record (R. 308). The administrative agency found it necessary to decide, and did decide, the fact question in a substantially judicial manner, and the fact findings made by the Commission were amply supported by the evidence.

Due process does not require in such a case a review of the administrative fact determinations on new and independent evidence, as all needful protection to rights adversely affected is given by a review proceeding in the nature of an appeal. The scope of the review proceeding in the courts on appeal from an order of the Railroad Commission in a matter of this kind is clearly set forth in the opinion by Mr. Justice Critz of the Texas Supreme Court in Gulf Land Company vs. Atlantic Refining Company, 134 Tex. 59, 131 S. W. (2d) 73, 82, 85, wherein it is stated:

"To our minds, the law contemplates that the fact findings made by the Commission in passing upon such applications are subject to review and correction by the courts only to the limited extent hereinafter stated. The court, on appeal from the Commission order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. Stated in another way, the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the

facts is reasonably supported by substantial evidence. 34 Tex. Jur., p. 712, sec. 11, and authorities cited. To permit the court to substitute its fact findings on controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary, would destroy all uniformity of Commission administration thereunder."

"* * *

"In deciding the issue of granting or refusing a well permit as an exception to Rule 37 to prevent waste, the Commission should be left reasonably free to exercise its sound judgment and discretion. The Commission should bear in mind, however, that it is its duty to conserve oil and gas above ground as well as below. In administering our oil and gas conservation statutes, the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field. In determining the issue of fairness or discrimination, some latitude must be allowed, because the subject of administration is so vast, complex, and complicated that its administrative agency cannot be placed in an absolute strait jacket. * * *"

We submit that the inquiry in the courts in the instant case was whether there was any substantial evidence to sustain the action of the administrative body in granting the permits under attack and that the record of the proceedings before the Railroad Commission, which was introduced in evidence by petitioners in the trial court, was sufficient to justify the Commission in drawing the conclusions that it did, and it was affirmatively found both by the trial court and the intermediate appellate court, the Court

of Civil Appeals, that the evidence before the Commission as contained in such record was amply sufficient to support the Commission's findings. Petitioners were not deprived of due process by the procedure followed in this case.

Point Two

The Supreme Court of Texas, having refused petitioners' application for writ of error in this cause, which said refusal is by virtue of the statutes of the State of Texas an approval both of the judgment and decision and opinion of the Court of Civil Appeals, is the highest court of the state in which a decision could be had, and a writ of certiorari may not be directed to the Court of Civil Appeals, an intermediate appellate court.

Article 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts of 1927, 40th Legislature, p. 214, ch. 144, Sec. 1, provides among other things that the Supreme Court of Texas shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law when same have been brought to the Court of Civil Appeals from final judgment of trial courts in certain named instances. The appellate jurisdiction is expressly vested in the Supreme Court in all cases in which the Railroad Commission of Texas is a party.

Said article further provides:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are

correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

The action of the Supreme Court of Texas in refusing an application for writ of error, as in the instant case, is an affirmance of the judgment of the intermediate state court, the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, and the Supreme Court by its judgment refusing the application for writ of error by virtue of the provisions of Article 1728, as amended by Acts of the 40th Legislature, *supra*, approved and upheld not only the judgment of said Court of Civil Appeals, but the opinion of the court as well.

In view of the positive and direct declaration of the Texas statutes, the action of the Supreme Court of Texas in refusing petitioners application for writ of error was an affirmance of the judgment and decision of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas in the instant case, and the petition for writ of certiorari is required to be directed to the Supreme Court of Texas.

This court has held that where the state court of last resort is vested with appellate jurisdiction to review the judgment of an intermediate appellate court, and has declined to grant the writ, this court will accept the interpretation of the state court of last resort as to whether the denial of writ amounts

to a total *refusal to exercise jurisdiction*, or whether it constitutes in effect an actual exercise of such jurisdiction, and is tantamount to an *affirmance* of the intermediate appellate court's judgment without written opinion. In the latter event, the appeal properly lies from the judgment of the state court of last resort and not from that of the intermediate appellate court.

Matthews v. Huwe, 269 U. S. 262-266, 70 L. Ed. 266;
Tumey v. State of Ohio, 273 U. S. 510, 515, 71 L. Ed. 749;
Van Huffel v. Harkelrode, 284 U. S. 225, 230, 231, 76 L. Ed. 256;
Whitfield v. Ohio, 297 U. S. 431, 435, 80 L. Ed. 778, 782.

The present law conferring jurisdiction upon the Supreme Court of Texas to review judgments of the Courts of Civil Appeals by writ of error is embraced in Article 1728 of the Revised Civil Statutes of Texas, 1925 Revision, as amended by Act of 1927.

In *Hamilton v. Empire Gas & Fuel Company*, by Section B of the Commission of Appeals of Texas, an auxiliary of the Supreme Court, opinion adopted by the Supreme Court (Dec. 8, 1937), 110 S. W. (2d) 561, the court held:

"The Supreme Court's refusal of the application for writ of error manifested its approval of the construction placed by the Court of Civil Appeals upon Article 1923 and of the decision of that court that the term of the district court was not legally extended by the order made by Judge Hurst. Article

1728, R. S. 1925, as amended by chapter 144, Acts Regular Session, 40th Legislature (1927), Vernon's Ann. Civil St., art. 1728.

"The refusal of the application for writ of error in Clayton v. Jobe, supra, evidenced also the approval of the decision of the Court of Civil Appeals therein that article 200a does not authorize the extension of a term of district court for the conclusion of the trial of a particular case but has application only to the extension of the term generally for the disposition of pending business."

Respondents, W. C. Turnbow, W. C. Turnbow Petroleum Corporation and the Railroad Commission of Texas, pray that the petition for writ of certiorari to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas be denied.

Respectfully submitted,

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